

Exhibit A

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION**

**UNITED STATES OF AMERICA and
OCCUPATIONAL SAFETY AND
HEALTH REVIEW COMMISSION,**

Petitioners,

vs.

**JOHNNY MULLINS and MICHAEL
BROWN,**

Respondents.

DECLARATION OF RON BAILEY

I, Ron Bailey, make the following Declaration pursuant to 28 U.S.C. § 1746:

1. I am an attorney employed in the Office of General Counsel of the Occupational Safety and Health Review Commission (“OSHRC”).
2. I make this Declaration in support of a request by the OSHRC that this Court enforce trial subpoenas issued by the OSHRC on the grounds that enforcement of the subpoenas would be consistent with law and with the policies of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (“the Act”).

3. The OSHRC is a quasi-judicial administrative agency established under section 12 of the Act, 29 U.S.C. § 661.

4. Commission Rule of Procedure 57(a), 29 C.F.R. § 2200.57(a), promulgated under the authority granted to the OSHRC in section 661(i), states that a Commission judge shall, “on the application of any party, issue to the applying party subpoenas requiring the attendance and testimony of witnesses and the production of any evidence. . . .”

5. On January 20, 2016, the Occupational Safety and Health Administration (OSHA, a component of the Department of Labor) issued a citation to Basic Energy Services following the collapse of an oil and gas service rig in Dacoma, Oklahoma. The citation, issued as a serious violation of section 5(a)(1) of the Act, 29 U.S.C. 654(a)(1), alleges that “[o]n or about July 23, 2015, employees working within an oil and gas service rig were not removed from the derrick prior to applying unusual loading on the rig.”

6. Basic Energy Services filed a notice of contest with OSHA on January 26, 2016, resulting in the adjudicatory proceeding—*Secretary of Labor vs. Basic Energy Services, LP*, OSHRC Docket No. 16-0367—before the OSHRC.

7. Pursuant to 29 C.F.R. § 2200.57(a), Administrative Law Judge Brian A. Duncan, at the request of the Office of the Solicitor for the Department of Labor, issued trial subpoenas to Johnny Mullins and Michael Brown on February 28, 2017. (Attach. 1 (trial subpoenas).)

8. According to the Department of Labor, the testimony of Mr. Mullins and Mr. Brown is necessary as they were working on the rig when it collapsed, they are the only Basic Energy Services employees on the rig who survived the collapse, and they likely would provide pertinent testimony concerning the events surrounding the accident, including their conduct during events leading to the accident.

9. Mr. Mullins was personally served the trial subpoena on February 28, 2017, which directed him to appear before ALJ Duncan in Dallas, Texas at Earle Cabell Federal Building, 1100 Commerce Street, Courtroom 726, at 9:00 a.m. on

March 9, 2017, to testify in the matter of *Basic Energy Services, LP*. (Attach. 1 (Mullins subpoena).)

10. Mr. Brown was personally served the trial subpoena on March 2, 2017, which directed him to appear before ALJ Duncan in Dallas, Texas at Earle Cabell Federal Building, 1100 Commerce Street, Courtroom 726, at 9:00 a.m. on March 9, 2017, to testify in the matter of *Basic Energy Services, LP*. (Attach. 1 (Brown subpoena).)

11. Upon information and belief, Mr. Mullins resides or is found at 12881 North Main Street, Overton, Texas 75684.

12. Upon information and belief, Mr. Brown resides or is found at 456 C.R. 245, Beckville, Texas 75631.

13. A hearing was held before ALJ Duncan at the address and time specified in the subpoenas personally served on Mr. Mullins and Mr. Brown, but neither Mr. Mullins nor Mr. Brown appeared at the hearing. (Attach. 2 (3/9/17 Hr'g Tr.).) ALJ Duncan, therefore, continued the case.

14. On March 29, 2017, the Department of Labor requested that OSHRC commence an enforcement proceeding with respect to the subpoenas personally served on Mr. Mullins and Mr. Brown.

15. In an order issued on October 12, 2017, ALJ Duncan set a new trial date, ordering the hearing to commence at 9:00 a.m. on March 1, 2018 in Tyler Texas.

16. ALJ Duncan issued two orders on February 6, 2018, requiring Mr. Mullins and Mr. Brown to appear and testify at the trial in the matter of *Basic Energy Services, LP* at 9:00 a.m. on March 1, 2018 in Tyler, Texas at William M.

Steger Federal Building and United States Courthouse, 211 West Ferguson Street, Courtroom 102. (Attach. 3 (2/6/2018 Orders).) On February 7, 2018, ALJ Duncan also signed trial subpoenas directing Mr. Mullins and Mr. Brown to appear for the March 1, 2018 trial. The trial subpoena directed to Mr. Brown was personally served on Mr. Brown on February 12, 2018. The trial subpoena directed to Mr. Mullins was personally served on Mr. Mullins on February 19, 2018. (Attach. 4 (Trial Subpoenas and Returns of Service re: Mullins and Brown)).

17. No intervening events, since Mr. Mullins and Mr. Brown failed to appear for the March 9, 2017 hearing, have provided a basis for concluding that they will appear for the rescheduled, March 1, 2018 hearing.

18. As required by 29 C.F.R. § 2200.57(e), enforcement of the subpoenas is consistent with law and with the policies of the Act.

19. The OSHRC recognizes in 29 C.F.R. § 2200.57(e) that it does not “assume[] responsibility for the effective prosecution” of the subpoenas “before the [C]ourt.” The OSHRC has, therefore, requested that the office of the United States Attorney petition this Court to enforce the subpoenas pursuant to 29 C.F.R. § 2200.57(e). (Attach. 5 (4/4/2017 referral letter).)

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 23rd day of February 2018.



Ron Bailey
Attorney Advisor
Occupational Safety and Health Review Commission

Attachment 1

Exhibit C
Return of Service of Michael Brown and Johnny Mullins

Secretary of Labor v. Basic Energy Services, LP
OSHRC Docket No. 16-0367
Motion to Enforce Commission Trial Subpoenas
ALJ Brian A. Duncan

SUBPOENA TO APPEAR AND TESTIFY

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

To Johnny Mullins, 12881 North Main Street, Overton, TX 75684

Request therefor having been duly made by Christopher D. Lopez-Loftis, Trial Attorney

of 525 S. Griffin St., Ste. 501 Dallas Texas
(Street) *(City)* *(State)*

YOU ARE HEREBY REQUIRED AND DIRECTED TO APPEAR before Honorable Judge Brian A. Duncan

of the Occupational Safety and Health Review Commission, at Courtroom 726, Earle Cabell
Federal Building, 1100 Commerce Street

in the City of Dallas, Texas 75242

on the 9th **day of** March, 20 17, **at** 9:00 **o'clock** a.m.

of that day, to testify in the Matter of Secretary of Labor v. Basic Energy Services, LP

OSHRC Docket No. 16-0367

And you are hereby required to bring with you and produce at said time and place the following books, records, correspondence, and documents:



In testimony whereof, the seal of the Occupational Safety and Health Review Commission is affixed hereto, and the undersigned has hereunto set hand and authorized the issuance hereof.

Issued at Denver, Colorado

This 28 **day of** February, 20 17

A handwritten signature in blue ink, appearing to read "B. Duncan".

Brian A. Duncan, Judge, OSHRC

U S Customs House
721 19th Street, Room 407
Denver, CO 80202-2517

NOTICE TO WITNESS. — Witness fees for attendance, subsistence, and mileage, under this subpoena are payable by the party at whose request the witness is subpoenaed. This subpoena should be retained and submitted with the voucher if reimbursement for witness fees from the U S Government is claimed.

RETURN OF SERVICE

I hereby certify that being a person over 18 years of age, I duly served a copy of the within subpoena

- In person
 by certified mail-return receipt requested
 by leaving a copy at principal office or place of business, or at the person's residence with some person of suitable age and discretion residing therein, to wit:

on the person named herein on Johnny Mullins

February 28, 2017 at 7:47 pm

(Month, Day, and Year)

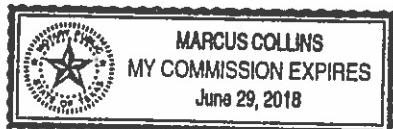
Michael J. Collins

(Name of person making service)

Process Server # SCH 359 Exp 7-31-17

(Official Title, if any)

State of Texas
County of SMITH
Sworn to and Subscribed Before
me on the 1 Day of March,
2017 Marcus Collins
Notary Public's Signature



On

(Month, Day, and Year)

(Name of person certifying)

(Official Title)

§2200.57 Issuance of subpoenas; Petitions to revoke or modify subpoenas; Right to inspect or copy data.

(a) *Issuance of subpoenas.* On behalf of the Commission or any member thereof, the Judge shall, on the application of any party, issue to the applying party subpoenas requiring the attendance and testimony of witnesses and the production of any evidence, including relevant books, records, correspondence, or documents, in his possession or under his control. The party to whom the subpoena is issued shall be responsible for its service. Applications for subpoenas, if filed prior to the assignment of the case to a Judge, shall be filed with the Executive Secretary at One Lafayette Centre, 1120 20th Street N.W., Suite 980, Washington, DC 20036-3457. After the case has been assigned to a Judge, applications shall be filed with the Judge. Applications for subpoena(s) may be made ex parte. The subpoena shall show on its face the name and address of the party at whose request the subpoena was issued.

(b) *Service of Subpoenas.* A subpoena may be served by any person who is not a party and is not less than 18 years of age. Service of a subpoena upon a person named therein may be made by service on the person named, by certified mail return receipt requested, or by leaving a copy at the person's principal place of business or at the person's residence with some person of suitable age and discretion residing therein.

(c) *Revocation or modification of subpoenas.* Any person served with a subpoena, whether ad testificandum or duces tecum, shall, within 5 days after the date of service of the subpoena upon him, move in writing to revoke or modify the subpoena if he does not intend to comply. All motions to revoke or modify shall be served on the party at whose request the subpoena was issued. The Judge or the Commission shall revoke or modify the subpoena if in its opinion the evidence whose production is required does not relate to any matter under investigation or in question in the proceedings or the subpoena does not describe with sufficient particularity the evidence whose production is required, or if for any other reason sufficient in law the subpoena is otherwise invalid. The Judge or the Commission, as the case may be, shall make a simple statement of procedural or other grounds for the ruling on the motion to revoke or modify. The motion to revoke or modify, any answer filed thereto, and any ruling thereon shall become a part of the record.

(d) *Rights of persons compelled to submit data.* Persons compelled to submit data or evidence at a public proceeding are entitled to retain or, on payment of lawfully prescribed costs, to procure copies of transcripts of the data or evidence submitted by them.

(e) *Failure to comply with subpoena.* Upon the failure of any person to comply with a subpoena issued upon the request of a party, the Commission by its counsel shall initiate proceedings in the appropriate district court for the enforcement thereof, if in its judgment the enforcement of such subpoena would be consistent with law and with policies of the Act. Neither the Commission nor its counsel shall be deemed thereby to have assumed responsibility for the effective prosecution of the same before the court.

§2200.65 Payment of witness fees and mileage; Fees of persons taking depositions.

Witnesses summoned before the Commission or the Judge shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States. Witness fees and mileage shall be paid by the party at whose instance the witness appears, and the person taking a deposition shall be paid by the party at whose instance the deposition is taken.

SUBPOENA TO APPEAR AND TESTIFY

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

TO Michael Brown, 456 CR 245, Beckville, TX 75631

Request therefor having been duly made by Christopher D. Lopez-Loftis, Trial Attorney

of 525 S. Griffin St., Ste. 501 Dallas Texas
(Street) (City) (State)

YOU ARE HEREBY REQUIRED AND DIRECTED TO APPEAR before Honorable Judge Brian A. Duncan

of the Occupational Safety and Health Review Commission, at Courtroom 726, Earle Cabell Federal Building, 1100 Commerce Street

in the City of Dallas, Texas 75242

on the 9th day of March, 20 17, at 9:00 o'clock a.m.

of that day, to testify in the Matter of Secretary of Labor v. Basic Energy Services, LP

OSHRC Docket No. 16-0367

And you are hearby required to bring with you and produce at said time and place the following books, records, correspondence, and documents:



In testimony whereof, the seal of the Occupational Safety and Health Review Commission is affixed hereto, and the undersigned has hereunto set hand and authorized the issuance hereof.

Issued at Denver, Colorado

This 28 day of February, 20 17

[Signature]

Brian A. Duncan, Judge, OSHRC

U.S. Customs House
721 19th Street, Room 407
Denver, CO 80202-2517

NOTICE TO WITNESS — Witness fees for attendance, subsistence, and mileage, under this subpoena are payable by the party at whose request the witness is subpoenaed. This subpoena should be retained and submitted with the voucher if reimbursement for witness fees from the U.S. Government is claimed.

RETURN OF SERVICE

I hereby certify that being a person over 18 years of age, I duly served a copy of the within subpoena

- In person

by certified mail-return receipt requested

by leaving a copy at principal office or place of business, or at the person's residence with some person of suitable age and discretion residing therein, to wit:

on the person named herein on MARCH 2, 2017 4:30 PM

03/03/2017

(Month Day, and Year)

LAREN TRITCH
(Name of person making)

SCH10955 EXP 5/31/17

(Official Title, if any)

I certify that the person named herein was in attendance as a witness at

()₁₁

(Month, Day, and Year)

(Name of person certifying)

(Official Title)

§2200.57 Issuance of subpoenas; Petitions to revoke or modify subpoenas; Right to inspect or copy data.

(a) *Issuance of subpoenas.* On behalf of the Commission or any member thereof, the Judge shall, on the application of any party, issue to the applying party subpoenas requiring the attendance and testimony of witnesses and the production of any evidence, including relevant books, records, correspondence, or documents, in his possession or under his control. The party to whom the subpoena is issued shall be responsible for its service. Applications for subpoenas, if filed prior to the assignment of the case to a Judge, shall be filed with the Executive Secretary at One Lafayette Centre, 1120 20th Street N.W., Suite 980, Washington, DC 20036-3457. After the case has been assigned to a Judge, applications shall be filed with the Judge. Applications for subpoena(s) may be made ex parte. The subpoena shall show on its face the name and address of the party at whose request the subpoena was issued.

(b) *Service of Subpoenas.* A subpoena may be served by any person who is not a party and is not less than 18 years of age. Service of a subpoena upon a person named therein may be made by service on the person named, by certified mail return receipt requested, or by leaving a copy at the person's principal place of business or at the person's residence with some person of suitable age and discretion residing therein.

(c) *Revocation or modification of subpoenas.* Any person served with a subpoena, whether ad testificandum or duces tecum, shall, within 5 days after the date of service of the subpoena upon him, move in writing to revoke or modify the subpoena if he does not intend to comply. All motions to revoke or modify shall be served on the party at whose request the subpoena was issued. The Judge or the Commission shall revoke or modify the subpoena if in its opinion the evidence whose production is required does not relate to any matter under investigation or in question in the proceedings or the subpoena does not describe with sufficient particularity the evidence whose production is required, or if for any other reason sufficient in law the subpoena is otherwise invalid. The Judge or the Commission, as the case may be, shall make a simple statement of procedural or other grounds for the ruling on the motion to revoke or modify. The motion to revoke or modify, any answer filed thereto, and any ruling thereon shall become a part of the record.

(d) *Rights of persons compelled to submit data.* Persons compelled to submit data or evidence at a public proceeding are entitled to retain or, on payment of lawfully prescribed costs, to procure copies of transcripts of the data or evidence submitted by them.

(e) *Failure to comply with subpoena.* Upon the failure of any person to comply with a subpoena issued upon the request of a party, the Commission by its counsel shall initiate proceedings in the appropriate district court for the enforcement thereof, if in its judgment the enforcement of such subpoena would be consistent with law and with policies of the Act. Neither the Commission nor its counsel shall be deemed thereby to have assumed responsibility for the effective prosecution of the same before the court.

§2200.65 Payment of witness fees and mileage; Fees of persons taking depositions.

Witnesses summoned before the Commission or the Judge shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States. Witness fees and mileage shall be paid by the party at whose instance the witness appears, and the person taking a deposition shall be paid by the party at whose instance the deposition is taken.

Attachment 2

March 9, 2017

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,		
Complainant		OSHRC DOCKET NO.
v.		16-0367
BASIC ENERGY SERVICES, L.P. and its successors		
Respondent		

United States Tax Court
Courtroom 726, 7th Floor
Earle Cabell Federal Building
1100 Commerce Street
Dallas, Texas 75242

Wednesday, March 9, 2017

The above-entitled matter came on for hearing at
at 9:00 a.m.

BEFORE:

BRIAN A. DUNCAN, Administrative Law Judge, OSHRC

March 9, 2017

APPEARANCES:

CHRISTOPHER D. LOPEZ-LOFTIS, Trial Attorney
BRIAN HURT, Trial Attorney
U.S. Department of Labor
Office of the Solicitor
525 S. Griffin Street, Suite 501
Dallas, Texas 75202-5020
Telephone: (972) 850-3100
Facsimile: (972) 850-3101

FOR THE SECRETARY OF LABOR

STEVEN R. McCOWN, ESQ.
SEAN M. McCRARY, ESQ.
LITTLER MENDELSON, PC
2001 Ross Avenue, Suite 1500, LB 116
Dallas, Texas 75201-2931
Telephone: (214) 880-8100
Facsimile: (214) 880-0181

FOR THE RESPONDENT

ALSO PRESENT:

Wayne Eyerly, CSHO, Oklahoma City Area Office
Steve Wild, District VP for Basic Energy Oklahoma/
Kansas Area

March 9, 2017

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WITNESSES [None]	
Court Reporter's Certificate	107

EXHIBITS

COMPLAINANT'S:

NUMBER	DESCRIPTION	ADMITTED
C-1	Inspection Report	74
C-2	Safety Narrative	74
C-3	Violation Worksheet	74
C-4	OSHA photo mounting worksheet	74
C-5	OSHA Citation and Notification of Penalty	74
C-6	Informal Conference Notes	Wd/22
C-7	OSHA Form 300	Wd/22
C-8	J. Mullins Deposition Transcript	Rej/69
C-9	M. Brown Deposition Transcript	Rej/69
C-11	Police Report	Rej/62
C-12	J. Mullins Recorded Statement	Wd/23
C-13	G. Ogle Recorded Statement	Wd/23
C-14	J. Mullins Recorded Statement Transcript	Wd/23
C-15	G. Ogle Recorded Statement Transcript	Wd/23

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C-16	Inspection Photos	Wd/23
C-17	Business Record Affidavit of Woods County Sheriff's Office	Rej/68
C-19	DOL National Contract Center Call Transcript of Steven Wild	Wd/24
RESPONDENT'S:		
NUMBER	DESCRIPTION	ADMITTED
R-1	Employee Safety Handbook	
R-2	Employee Policy Handbook	
R-3	Rig Controls, Functions and Operation	
R-4	Supervisor's Monthly Inspection Forms	
R-5	Base Beam Conformance Certificate	
R-6	Rig 1793 Conformance Certificates	
R-7	Mast Certificate	

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PROCEDINGS

[9 : 00 a . m .]

3 JUDGE DUNCAN: Let's go on the record. Good
4 morning again to everyone.

5 This is a trial in the case of the
6 *Secretary of Labor versus Basic Energy Services,*
7 OSHRC Docket No. 16-0367.

8 My name is Brian Duncan. I'm the
9 Judge from the United States Occupational Safety
10 and Health Review Commission that's been assigned
11 to preside over this trial.

I say this in the beginning because I
make sure that everyone understands, because
occasionally I have people in trial that don't
understand what the Occupational Safety and Health
Review Commission is, particularly for witnesses,
and I know counsel are aware of it, but the
Occupational Safety and Health Review Commission
has no affiliation with OSHA whatsoever. We are a
separate federal agency.

21 There are 12 judges throughout the
22 country who decide Federal OSHA disputes between
23 the government, the OSHA prosecutors, investigators
24 and their prosecutors in the Solicitor's Office,
25 and the regulated employers who receive citations

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1 from the government.

2 So our job is to, without any bias or
3 prejudice or inclination one way or the other, to
4 dissolve -- resolve these disputes according to the
5 facts and the law that applies to the case.

6 This trial is being conducted pursuant
7 to the provisions of the Occupational Safety and
8 Health Act of 1970, specifically Section 10, as
9 well as the rules and regulations of the United
10 States Occupational Safety and Health Review
11 Commission.

12 The trial is being transcribed by Ms.
13 Ann Berry, who's been designated as the official
14 court reporter for this case. If you'd like to
15 receive a copy of the transcript of this trial, you
16 can purchase a copy of the transcript from
17 Ms. Berry. She probably has already given you her
18 information to contact her.

19 Counsel for the Secretary, if you'd
20 introduce yourself, tell me who you have at counsel
21 table and tell me who your party representative is,
22 please.

23 MR. LOPEZ-LOFTIS: Yes, Your Honor.
24 Christopher Lopez-Loftis. With me here is Brian
25 Hurt, Senior Trial Attorney in the Solicitor's

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1 Office. And our client rep is going to be Wayne
2 Eyerly in the yellow tie, who's a Compliance
3 Officer with OSHA. And also we have Mr. James
4 Nelson, also with OSHA out of the Health Response
5 team, out of Salt Lake City, Utah.

6 JUDGE DUNCAN: Thank you. What was the
7 Compliance Officer representative's name again?

8 MR. LOPEZ-LOFTIS: His name is Wayne Eyerly.

9 JUDGE DUNCAN: Please spell that last name.

10 MR. LOPEZ-LOFTIS: It is E-Y-E-R-L-Y.

11 JUDGE DUNCAN: All right. Thank you.

12 JUDGE DUNCAN: And for Respondent?

13 MR. McCRRORY: I'm Sean McCrory from Basic
14 Energy. I'm here with Mr. Steven McCown. Our
15 company representative is Mr. Steve Wild, and he is
16 the Vice President over Oklahoma and Kansas for
17 Basic Energy.

18 JUDGE DUNCAN: Thank you. Did you say Wild?

19 MR. McCRRORY: Wild, W-I-L-D.

20 JUDGE DUNCAN: Thank you. All right. We have
21 -- when you look at it on paper, it's not a big
22 case. It's a one serious item, \$7,000 case.

23 However, I think it's going to be a
24 maybe a little more complicated than a typical one
25 serious \$7,000 proposed case. It's got a proposed

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1 penalty of, like I said, \$7,000 issued as a result
2 of OSHA Inspection No. 1084476.

3 Am I in the right place? Do we have
4 the right case? One serious citation, Mr. McCrory?

5 Mr. McCRORY: That is correct.

6 JUDGE DUNCAN: All right. Mr. -- do you want
7 to be called Mr. Lopez-Loftis or can I call you
8 "Mr. Lopez"?

9 MR. LOPEZ-LOFTIS: "Mr. Lopez" is fine, Your
10 Honor.

11 JUDGE DUNCAN: All right. Thank you. This is
12 a conventional case, as opposed to a simplified
13 case. Therefore, Commission Rules 69, 70, 71 and
14 72 apply, which specifically incorporate, as you
15 all know, the Federal Rules of Evidence.

16 I have gone through your pretrial
17 statements. I appreciate you submitting those. I
18 know we have a pending motion.

19 Actually, I'll tell you what we have.
20 We have a pending motion, a pending supplemental
21 motion, then a response to that motion, then a
22 reply to the response to the motion; am I right?

23 MR. LOPEZ-LOFTIS: That's correct, Your Honor.

24 MR. McCOWN: That's correct.

25 JUDGE DUNCAN: Okay. We're going to get to

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1 that. We're probably going to spend a fair amount
2 of our morning going through the issues related to
3 that motion, and I'll give you my decision on the
4 motion and the response to the motion after I talk
5 to y'all about it and we're going to work through
6 it.

7 But I want to walk through a couple of
8 things before we do that. One is that I know there
9 are some objections to some witnesses. But as we
10 come to these trials, at least in my experience,
11 the information that's contained in the pretrial
12 statements sometimes changes between the time that
13 it's submitted and the time that we actually show
14 up here in the morning ready to go with our
15 witnesses and exhibits.

16 So the first thing I want to do is go
17 through the proposed witness lists with the parties
18 and make sure that the anticipated number of
19 witnesses and specific witnesses haven't changed.

20 Mr. Lopez, I'll start with you. Is
21 generally -- is your witness list going to be the
22 same or can we remove some folks on that list?

23 MR. LOPEZ-LOFTIS: Yes, Your Honor. We do have
24 some changes.

25 JUDGE DUNCAN: Okay.

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1 MR. LOPEZ-LOFTIS: And there's another issue
2 that I think we should bring to the Court's
3 attention.

4 Two of the witnesses that are listed,
5 the Secretary intended to have them testify today.
6 That's Mullins and Brown, which both are under
7 subpoena, but we do not see them in the court as of
8 present. And so in the event that they don't show
9 up to give their testimony, we would ask that the
10 Court would allow us to leave the record open to
11 take their post-trial depositions.

12 JUDGE DUNCAN: We've got somebody walking in
13 the back right now. Could that be one of them?

14 MR. LOPEZ-LOFTIS: No, that is another attorney
15 in our Solicitor's office.

16 JUDGE DUNCAN: Okay. All right.

17 MR. LOPEZ-LOFTIS: And then as far as the only
18 other remaining witness -- actually three. So we
19 have George Ogle. He has -- we attempted service,
20 but we were not able to get him served, so we don't
21 expect him to be here to testify.

22 And then the deputies with the
23 Sheriff's office, Deputy David Cummings and Deputy
24 Keith Dale, we have not subpoenaed them, but we
25 have a proposed business record affidavit to get

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1 some exhibits in that they would have ultimately
2 testified to.

3 JUDGE DUNCAN: So David Cummings will not be
4 called to testify.

5 MR. LOPEZ-LOFTIS: And Keith Dale --

6 JUDGE DUNCAN: Keith Dale will not be called to
7 testify.

8 MR. LOPEZ-LOFTIS: And George Ogle.

9 JUDGE DUNCAN: And George Ogle will not be
10 called to testify.

11 You subpoenaed Mr. Mullins and Mr.
12 Brown?

13 MR. LOPEZ-LOFTIS: Yeah.

14 JUDGE DUNCAN: Do you have proof of service for
15 that?

16 MR. LOPEZ-LOFTIS: I do, Your Honor, with a
17 small caveat. Well, for Mullins, I do have his
18 return of service here with me today.

19 With regards to Brown, I have proof
20 via email from a process server that he was
21 successfully served. However, his return is
22 actually in the mail on its way back to our office.
23 And so he was served, Your Honor, but I do not have
24 his return of service with me. We followed up as
25 late as yesterday on that proof of service. And I

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1 suspect if it's not in our office mailbox today,
2 that it's en route.

3 JUDGE DUNCAN: When did you serve Mr. Mullins
4 and Mr. Brown?

5 MR. LOPEZ-LOFTIS: So Mr. Brown was served on
6 March 2nd at 4:30 p.m., according to the email from
7 the process server. And then according to the
8 return of service for Johnny Mullins, he was served
9 February 28th at 7:47 p.m.

10 JUDGE DUNCAN: All right. Thank you.

11 MR. LOPEZ-LOFTIS: And also, Your Honor -- I'm
12 sorry to interrupt --

13 JUDGE DUNCAN: Go ahead.

14 MR. LOPEZ-LOFTIS: -- well, from what I
15 understand, Brown was served on a third attempt, so
16 if -- and I believe Mullins was served on his first
17 or second attempt, so given that it took a couple
18 of times to actually get them served, I think
19 that's the reason for the short delay in getting
20 Brown served.

21 But both subpoenas went out on the
22 same day. Actually all three, with George Ogle,
23 but we were unsuccessful in getting him served.

24 JUDGE DUNCAN: Okay. Do you still plan to call
25 Mr. Eyerly? Is that how you pronounce it, again?

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1 MR. LOPEZ-LOFTIS: Yes, Your Honor.

2 JUDGE DUNCAN: And Mr. Nelson?

3 MR. LOPEZ-LOFTIS: Yes, Your Honor.

4 JUDGE DUNCAN: Okay. Thank you. And for the
5 Respondent, you only had one witness listed,
6 correct?

7 MR. McCRRORY: That's correct. We just have
8 Steve Wild.

9 JUDGE DUNCAN: Okay. Do you still anticipate
10 calling him?

11 MR. McCRRORY: That's correct.

12 JUDGE DUNCAN: All right. Thank you.

13 MR. McCRRORY: And, Your Honor, as long as it's
14 not premature, we would also like to invoke the
15 rule.

16 JUDGE DUNCAN: That is the next thing on my
17 list. I appreciate that. Yeah, my practice is to
18 sequester all the witnesses to make sure that one
19 witness' testimony doesn't influence the testimony
20 of another. Now you've already moved for that.

21 Do you have any objection, Mr. Lopez?

22 MR. LOPEZ-LOFTIS: No, Your Honor.

23 JUDGE DUNCAN: Okay. I'm going to ask at this
24 point, then, that all of the testifying witnesses
25 that are in the courtroom, other than party

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representatives, be excused out in the hallway.

2 What we'll do is, we'll go off the record for a
3 second so that she -- let's go off the record.

4 [Off the record.]

5 JUDGE DUNCAN: All right. We're back on the
6 record just after about a five-minute break in
7 which we opened one of the Petitioner counsel rooms
8 next door to the courtroom so that the witnesses
9 can wait until they're called to testify, pursuant
10 to Rule 615 under sequestration.

11 And I would ask counsel during the
12 course of the trial today and tomorrow to help me
13 to make sure that if you see a testifying witness
14 in the courtroom, that you either let opposing
15 counsel know, let me know, to make sure they're not
16 in here listening to testimony when they shouldn't
17 be.

18 All right?

19 MR. LOPEZ-LOFTIS: Yes, Your Honor.

20 MR. McCRORY: Understood.

21 JUDGE DUNCAN: Thank you. We've got from both
22 your pretrial statements, both of you indicated
23 there weren't any stipulations, but that you'd be
24 willing to stipulate to a couple of things and
25 there was some overlap.

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1 The two things that you said you'd be
2 willing to stipulate to were employer status under
3 the Act and the Commission's jurisdiction over this
4 case.

5 And since the two that overlapped, I
6 think, are really isolated in your pretrial
7 statement, Mr. McCrory, would you mind first
8 verifying that you're willing to stipulate to those
9 two issues?

10 MR. McCRORY: That is correct, Your Honor, we
11 are.

12 JUDGE DUNCAN: Mr. Lopez, I assume you're also
13 willing to stipulate to that?

14 MR. LOPEZ-LOFTIS: That is correct, Your Honor.

15 JUDGE DUNCAN: All right. Would you mind
16 reading those into the record, please?

17 MR. McCRORY: Absolutely. Respondent is
18 willing to stipulate to the following:

19 The Commission has jurisdiction over
20 this proceeding under Section 10(c) of the
21 Occupational Safety and Health Act. That's 29 USC
22 Section 659(c). Basic Energy Service is an
23 employer engaged in a business affecting "commerce"
24 within the meaning of Section 35 of the Act, 29 USC
25 Section 652(5).

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1 JUDGE DUNCAN: Thank you. Mr. Lopez, do you
2 agree?

3 MR. LOPEZ-LOFTIS: Yes, Your Honor.

4 JUDGE DUNCAN: All right. So those
5 stipulations are entered into the record.

6 Before we get into the motions on the
7 timeliness and the discovery disclosure of the
8 certain witnesses and exhibits, are there any other
9 issues we need to cover before we get into that?

10 MR. McCOWN: May I have a word, Your Honor?

11 JUDGE DUNCAN: Please.

12 MR. McCOWN: This is just for the -- the young
13 lawyers in the room.

14 How do you prefer? They've been
15 standing up and sitting down very appropriately.
16 Do you prefer them to stand up when we're
17 addressing you? Do you want us to use the podium
18 for --

19 JUDGE DUNCAN: No, I'll leave it up to you, but
20 I will tell you, as I was trained and as I've tried
21 cases all the way up until I was appointed to this
22 position, when I addressed any judge, even if I was
23 fighting a speeding ticket, I at least stood. But
24 I will leave it to each of your discretion. I
25 mean, we're not in a big courtroom here, but I

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1 always stood when I addressed the Court.

2 MR. McCOWN: And it's okay to use the podium?

3 JUDGE DUNCAN: Absolutely.

4 MR. McCOWN: And do they need to ask permission
5 to approach the witness?

6 JUDGE DUNCAN: Please.

7 MR. McCOWN: Okay. Anything that we need to
8 know?

9 JUDGE DUNCAN: No.

10 MR. McCOWN: Okay. Thank you.

11 JUDGE DUNCAN: Pretty much good questions.
12 Thank you.

13 Any other issues before we get into
14 the motions?

15 MR. LOPEZ-LOFTIS: No, Your Honor.

16 JUDGE DUNCAN: All right.

17 MR. McCOWN: Nothing further.

18 JUDGE DUNCAN: Okay. I have reviewed the
19 motion, the supplemental motion, the response to
20 the motion, as I said earlier, and then the reply
21 to the motion. And I know you requested a
22 conference call, and I indicated that I didn't need
23 a conference call, and that's because those kinds
24 of issues I like to deal with at the beginning of
25 the trial.

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1 My understanding of the motion is that
2 there is an issue regarding the timeliness of the
3 Complainant's disclosure of the trial exhibits to
4 the Respondent, that there are some witnesses. And
5 we're going to go back through that all.

6 There are some witnesses on there that
7 you say weren't disclosed through discovery, and
8 they would have been responsive.

9 And then there are some exhibits that
10 were not produced in discovery that would have been
11 responsive that are on the Secretary's pretrial
12 exhibit list.

13 Is that a pretty good summation?

14 MR. McCRRORY: That is fair, yes.

15 JUDGE DUNCAN: Okay. And I also remember
16 reading, I think, in the reply that there were
17 still, as of the date of the reply, a couple of
18 exhibits that had still not been produced?

19 MR. McCRRORY: That is correct. But since then,
20 Mr. Lopez has informed me that he will not be
21 presenting those exhibits.

22 JUDGE DUNCAN: Okay. That's good. Thank you.
23 Because one of the things I want to do, like we did
24 with the witness list, Mr. Lopez, before we get
25 into the arguments on the motion, is go through and

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1 determine which of those exhibits you still intend
2 to offer and which ones you don't. It may resolve
3 some of the disputes. It sounds like it might
4 resolve at least a couple of them.

5 MR. LOPEZ-LOFTIS: Yes, Your Honor.

6 JUDGE DUNCAN: Let's do that now. Let's go
7 through your proposed exhibit lists.

8 MR. LOPEZ-LOFTIS: And you are absolutely
9 correct, Your Honor. Generally speaking, I think
10 that only a few exhibits, two to be exact, that the
11 Secretary actually intends to introduce into
12 evidence that the Respondent has objected to, and
13 those are the Exhibit No. 11, which is the police
14 report.

15 JUDGE DUNCAN: Okay.

16 MR. LOPEZ-LOFTIS: And also the business record
17 affidavit to authenticate that police report.

18 With regards to the remaining --

19 JUDGE DUNCAN: Do you have the business record
20 affidavit attached to this part of C-11?

21 MR. LOPEZ-LOFTIS: That is correct.

22 JUDGE DUNCAN: Okay.

23 MR. LOPEZ-LOFTIS: And just for the record,
24 Your Honor, the business record affidavit is also
25 attached to Exhibits C -- excuse me -- C-12 and

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1 C-13, which are the recorded interviews from the
2 deputy's interview with the employees on location
3 at the scene of the accident.

4 JUDGE DUNCAN: All right. And you started this
5 out by saying these are exhibits you still plan to
6 introduce or that you [overlapping speakers] --

7 MR. LOPEZ-LOFTIS: That is correct. And so
8 what I understand from Respondent's motion, the
9 remaining exhibits -- and they can feel free to
10 correct me if I'm wrong -- the remaining exhibits
11 that they have objected to which we do not intend
12 to introduce but mainly use as for impeachment
13 purposes, with a caveat of the issue with the two
14 witnesses that have not shown up today but which we
15 can address that, as well. But we have Exhibit No.
16 8, 9 --

17 JUDGE DUNCAN: Okay. These are exhibits you're
18 not intending to offer into evidence?

19 MR. LOPEZ-LOFTIS: That is correct, Your Honor.

20 JUDGE DUNCAN: Okay.

21 MR. LOPEZ-LOFTIS: Again, specifically in
22 speaking to Exhibit 8 and 9, which are the
23 deposition transcripts for Mr. James -- Johnny
24 Mullins and Michael Brown, which are the two
25 witnesses that are under subpoena that are not here

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1 as of now still, these are some deposition
2 transcripts from their companion State court
3 litigation on some personal injury matters, which I
4 believe in one -- which I know in one of the cases
5 Basic Energy is a party to that litigation.

6 But in both of the depositions, both
7 Brown and Mullins are testifying to the events that
8 occurred on this -- on the day of this accident.

9 And then just to go through the
10 remaining exhibits --

11 JUDGE DUNCAN: Let's start with Exhibit 1, and
12 let's kind of work through it that way.

13 MR. LOPEZ-LOFTIS: Okay.

14 JUDGE DUNCAN: Are you still planning to offer
15 Exhibit 1, C-1?

16 MR. LOPEZ-LOFTIS: Yes, Your Honor.

17 JUDGE DUNCAN: C-2?

18 MR. LOPEZ-LOFTIS: Yes, Your Honor.

19 JUDGE DUNCAN: C-3?

20 MR. LOPEZ-LOFTIS: Yes, Your Honor.

21 JUDGE DUNCAN: C-4?

22 MR. LOPEZ-LOFTIS: Yes, Your Honor.

23 JUDGE DUNCAN: C-5?

24 MR. LOPEZ-LOFTIS: Yes, Your Honor.

25 JUDGE DUNCAN: C-6?

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1 MR. LOPEZ-LOFTIS: No, Your Honor.

2 JUDGE DUNCAN: All right. So C-6 is withdrawn?

3 MR. LOPEZ-LOFTIS: Yes.

4 [Complainant's Exhibit No. C-6 was
5 withdrawn.]

6 JUDGE DUNCAN: C-7?

7 MR. LOPEZ-LOFTIS: That is withdrawn, as well.

8 JUDGE DUNCAN: You said withdrawn?

9 [Complainant's Exhibit No. C-7 was
10 withdrawn.]

11 MR. LOPEZ-LOFTIS: Yes.

12 JUDGE DUNCAN: C-8 and -9 are withdraw, as you
13 already said.

14 MR. LOPEZ-LOFTIS: They are withdrawn, with the
15 caveat of the witnesses up and testifying today.

16 JUDGE DUNCAN: Okay.

17 MR. LOPEZ-LOFTIS: So I would say I will
18 represent to the Court they're provisionally
19 withdrawn.

20 JUDGE DUNCAN: All right. C-10?

21 MR. LOPEZ-LOFTIS: We intend to produce.
22 Introduce, excuse me. Also, C-11.

23 JUDGE DUNCAN: Okay. C-12 and -13?

24 MR. LOPEZ-LOFTIS: We do not intend to
25 introduce.

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1 JUDGE DUNCAN: C-14?

2 MR. LOPEZ-LOFTIS: Withdrawn, Your Honor.

3 JUDGE DUNCAN: C-15?

4 MR. LOPEZ-LOFTIS: Withdrawn.

5 JUDGE DUNCAN: C-16?

6 MR. LOPEZ-LOFTIS: Withdrawn.

7 [Complainant's Exhibit No. C-12 - C-16
8 were withdrawn.]

9 JUDGE DUNCAN: C-17?

10 MR. LOPEZ-LOFTIS: We intend to introduce that
11 exhibit, Your Honor.

12 JUDGE DUNCAN: C-18?

13 MR. LOPEZ-LOFTIS: We also intend to introduce
14 that exhibit.

15 JUDGE DUNCAN: Okay. Let me go back to C-17,
16 because I asked you if the business record
17 affidavit was attached to C-11.

18 Is C-17 a separate business record
19 affidavit or did you just duplicate it?

20 MR. LOPEZ-LOFTIS: It is a separate business
21 record affidavit, but it is the affidavit that is
22 attached to -- I guess, the way I understood your
23 question, it is the affidavit that is attached to
24 Exhibit 11, but it is marked as a separate exhibit
25 in itself.

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1 JUDGE DUNCAN: Okay. And C-18?

2 MR. LOPEZ-LOFTIS: We intend to introduce that
3 exhibit, Your Honor.

4 JUDGE DUNCAN: And C-19?

5 [Complainant's Exhibit No. C-19 was
6 withdrawn.]

7 MR. LOPEZ-LOFTIS: That is withdrawn, Your
8 Honor.

9 JUDGE DUNCAN: All right. Thank you. Do you
10 have or have you already given a copy of the proof
11 of service documentation that you have to
12 Respondent's counsel?

13 MR. LOPEZ-LOFTIS: I have not, Your Honor.

14 JUDGE DUNCAN: Do you have extra copies of it?

15 MR. LOPEZ-LOFTIS: I do have a -- a copy that I
16 am willing to turn over to the Respondent. With
17 the second, I guess, proof of service is the email
18 confirmation with the proof of service actually en
19 route to our office. I'm also willing to turn that
20 over, as well.

21 JUDGE DUNCAN: Okay. You do have an extra copy
22 of both of those? If so, would you please give it
23 to Mr. McCrory or Mr. McCown.

24 MR. LOPEZ-LOFTIS: Actually, Your Honor, this
25 is -- my proof of service is actually an original.

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1 JUDGE DUNCAN: Okay.

2 MR. LOPEZ-LOFTIS: I'm willing to make copies
3 and have them turned -- and turned over to the
4 Respondents today, but as for sake of actually
5 showing them to the Respondents, I'm willing to
6 turn it over so they can review it right now.

7 JUDGE DUNCAN: All right. Let's do that, at
8 least.

9 You haven't seen this yet before? Mr.
10 McCrory, is that right?

11 MR. McCRORY: No.

12 JUDGE DUNCAN: Okay. Mr. Lopez, are Mr.
13 Mullins and Mr. Brown still employed by the
14 Respondent currently as far as you know?

15 MR. LOPEZ-LOFTIS: Based on information that
16 I've received, they are not still employed with
17 Basic Energy.

18 JUDGE DUNCAN: Okay. Mr. McCrory, do you know
19 whether or not they're still employed with Basic
20 Energy?

21 MR. McCRORY: They are not employed.

22 JUDGE DUNCAN: Okay. Have you had a chance to
23 take a look at those proofs of service? Do you
24 have any dispute as to the one that Mr. Lopez said
25 or any objection as emailed but the actual written

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1 proof of service is on its way here? In terms of
2 that not having actually been executed?

3 MR. McCOWN: May I respond to that?

4 JUDGE DUNCAN: Please.

5 MR. McCOWN: I don't have any basis to -- to
6 dispute what he's representing to the Court
7 whatsoever. I'm assuming that that's -- that's
8 what we're going to eventually be receiving.

9 JUDGE DUNCAN: Okay.

10 MR. McCOWN: But there's, you know, more of an
11 issue to that that we would reserve the right to
12 discuss when we --

13 JUDGE DUNCAN: Let's talk about it now. Go
14 ahead, Mr. McCown.

15 MR. McCOWN: Okay. The -- I've been faced with
16 this before and you probably have, too. These
17 subpoenas are kind of interesting vehicles because
18 of the -- the lack of self-enforcement of the
19 subpoenas.

20 Both of these individuals are
21 represented by counsel, independent counsel, not --
22 not my law firm. They have a lawsuit pending for
23 personal injuries and things like that. Their
24 lawyer is advising them as to whether they should
25 be appearing or not, not Littler Mendelson since we

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1 don't have anything to do with that anymore.

2 It's my understanding that if someone
3 is -- is not going to appear, that there are issues
4 that have to be resolved by filing an application
5 with the Review Commission to -- to start
6 proceedings to enforce.

7 In the past, the way I've seen that
8 handled -- I'm not saying that's right or wrong --
9 is that if you wait until the time of the hearing
10 to do it, then the only remedy for that is that
11 rather than keeping it open, which is unfair, I
12 think, to the Respondent, is to continue the case
13 until they get the -- the -- either the agreement
14 of them to appear or it goes through the process of
15 -- I believe what happens is that you have to write
16 something up and an application goes to Washington,
17 and then they issue a decision as to whether the
18 subpoena should be enforced.

19 And then they go to a court, a federal
20 court, which is -- we're sitting in Dallas, and I
21 understand these people are in East Texas outside
22 of the hundred mile subpoena range of a Dallas
23 federal court, so you have to go somewhere else and
24 get it enforced.

25 And that means that we're probably

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1 looking at -- and I've never actually seen this go
2 to fruition, but it's going to take a lot to do it,
3 and that's why I'm very much against holding the
4 record open.

5 This is something that -- you know,
6 we've had this case pending for a number of months,
7 and it was postponed because of my oral argument at
8 the Fifth Circuit and then you moved it here. So I
9 -- I think that these things should be taken care
10 of in advance. I know that there were some
11 attempts to try to take some depositions, and that
12 didn't go through.

13 But there's this collateral litigation
14 that's pending, so -- and I may be a little bit
15 premature, but we do not agree to holding the
16 record open, and we think that these individuals
17 should've -- if they really wanted them here to
18 testify, they should have had this taken care of in
19 advance.

20 JUDGE DUNCAN: Thank you.

21 MR. LOPEZ-LOFTIS: May I respond, Your Honor?

22 JUDGE DUNCAN: Please go ahead.

23 MR. LOPEZ-LOFTIS: Your Honor, I represented to
24 the Court that the Secretary -- me working on
25 behalf of the Secretary has made ample efforts to

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1 get these witnesses here today. I have conferred
2 with their counsel in the State court litigation on
3 whether or not they would accept these subpoenas on
4 their behalf, which they declined.

5 And given that, we assumed the efforts
6 to actually get a process server to get these
7 witnesses served. There was multiple attempts
8 made, and they were finally served, and we did not
9 find out that they would not show up to testify
10 here today, obviously, until we showed up to court
11 today.

12 I have not had a chance to talk with
13 these witnesses outside of the fact that -- to
14 figure out whether or not they were represented by
15 an attorney. And so we have not had an
16 opportunity, a sufficient opportunity to get these
17 witnesses here today outside of what we did, which
18 we represented to the Court that we attempted to
19 exhaust every resource to get these witnesses here
20 today.

21 JUDGE DUNCAN: Okay. Thank you. Before we
22 keep going with this, I see five people in the back
23 on kind of the Respondent's side of room. It
24 doesn't mean they're affiliated with Respondents.
25 I want to make sure, other than Mr. Wild, none of

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1 those are testifying witnesses, correct?

2 MR. McCRRORY: That is correct.

3 MR. LOPEZ-LOFTIS: No. No, Your Honor.

4 JUDGE DUNCAN: Same thing with the folks behind
5 you?

6 MR. LOPEZ-LOFTIS: That is correct, Your Honor.

7 JUDGE DUNCAN: Okay. Thank you. All right.

8 So we have Mr. Mullins. It's now 9:30. We started
9 the trial a minute ago. I'm sorry, Mr. Mullins and
10 Mr. Brown.

11 What I need you to do -- I want to
12 break as soon as possible -- is make a copy of the
13 service documentation that you do have, the
14 executed proof of service and the email from the
15 process server indicating that the person's been
16 served and that the actual original proof of
17 service is on its way, a copy for the Respondent
18 and then a copy to mark in this record.

19 So let's do that as soon as possible.
20 I know your office is closed. Maybe you can have
21 somebody run over and copy it. I don't think I
22 have a copy machine back here. I was just here two
23 weeks ago and the same issue came up, and I don't
24 think there's one back there. Otherwise, I'd just
25 do it for you.

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1 MR. LOPEZ-LOFTIS: Yes, Your Honor, that's no
2 problem.

3 MR. McCOWN: I think there's a GSA office right
4 here on the corner.

5 JUDGE DUNCAN: You can ask them. I'm going to
6 put it on you.

7 MR. LOPEZ-LOFTIS: Okay.

8 JUDGE DUNCAN: Come up with two copies.

9 MR. McCOWN: Well, they're supposed to be
10 working for us, so...

11 JUDGE DUNCAN: They should be. We're all
12 supposed to be. All right.

13 So we're going to table the Mullins
14 subpoena and the Brown subpoena and their
15 nonappearance this morning.

16 Before you served them the subpoenas,
17 did you know they were represented by counsel in a
18 matter related to this case?

19 MR. LOPEZ-LOFTIS: Before I served them with
20 the subpoenas? Yes, Your Honor.

21 JUDGE DUNCAN: Did you have any communication
22 with their attorneys?

23 MR. LOPEZ-LOFTIS: I did, Your Honor. As I
24 represented earlier, I actually conferred with the
25 counsel, and I have the email confirmation that I

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1 can present to the Court of these communications
2 that I had whether or not they would actually
3 accept the subpoenas, for which they declined.

4 JUDGE DUNCAN: Okay. Any indication from them
5 about whether or not, if you did serve them
6 personally, they would appear this morning for this
7 trial?

8 MR. LOPEZ-LOFTIS: Your Honor, after they
9 declined, we did have some brief dialog about that
10 specific issue, which I sent an email response, for
11 which I did not get a reply. And so that was my
12 last line of communication with their attorneys.

13 And again, all this is via email,
14 which I can confirm if given that opportunity.

15 JUDGE DUNCAN: Okay.

16 MR. McCOWN: May I -- may I respond?

17 JUDGE DUNCAN: Please.

18 MR. McCOWN: This is a little additional
19 information for the record because this was before
20 the Solicitor's Office, I believe, was even
21 involved.

22 The Oklahoma Area Office, while the
23 inspection was still pending before the six months
24 lapsed, subpoenaed Mr. Mullins and Mr. Brown and
25 several other people, I believe. And I can go back

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1 through our files and bring this after lunch or
2 something.

3 JUDGE DUNCAN: An administrative subpoena --

4 MR. McCOWN: Administrative subpoena --

5 JUDGE DUNCAN: -- as part of the investigation?

6 MR. McCOWN: Yes. They refused. They were
7 represented by counsel at the time, and they
8 refused to appear.

9 And an enforcement action was actually
10 filed in the federal court in East Texas. And the
11 enforcement action -- before there was a chance for
12 the judge to rule, because they were going to be
13 represented by counsel and they were going to be a
14 Respondent and everything, the citations were
15 issued because it came up to the last several days.
16 And so that mooted the enforcement action, and they
17 just dropped it.

18 So this has been going on for some
19 time. The Area Director, they're based in Oklahoma
20 City, wanted their depositions. And of course,
21 being in Oklahoma and the witnesses being in Texas,
22 it made it difficult.

23 So this is not the first attempt by
24 the Solicitor's Office. It actually happened even
25 back at the end of the inspection before the action

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1 -- and I can't tell you off the top of my head when
2 it was. It's probably in the citation. But this
3 was right at the end of the six-month period. But
4 I can get you that information if it's important.

5 JUDGE DUNCAN: Oh, that's important
6 information. I mean, just that you've informed me
7 of that, and I appreciate it.

8 Do you agree with all of that? Is
9 that correct? Have you heard of it?

10 MR. LOPEZ-LOFTIS: I do, Your Honor. Yeah, I
11 do, Your Honor. From what I understand, while the
12 file was still with OSHA, they did have those, I
13 guess, attempts to get these guys served the
14 subpoenas for depositions.

15 However, since I have gotten on the
16 case, I had my independent efforts that I've made
17 to, one, get -- get these guys deposed, and then
18 also get them served with the subpoenas to testify
19 here today.

20 And so again I'll just reiterate, Your
21 Honor, it is -- you know, it is the Secretary's
22 position that we've made every effort to get Brown
23 and Mullins served and get them here to testify.

24 Again, I've communicated with their
25 counsel, and I've conferred briefly with Respondent

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1 on the issues kind of generally speaking. And
2 again, we did not know whether or not they would
3 show up to testify until we showed up today here in
4 court.

5 JUDGE DUNCAN: Okay. But I am concerned.
6 Everything that Mr. McCown has said about the
7 description of the process of enforcing subpoenas
8 is accurate.

9 I don't enforce subpoenas. My agency
10 doesn't enforce our subpoenas. The way our
11 regulations and the statute is set up, that is
12 handed over to, really, the district court system
13 to enforce the subpoenas and for whoever has served
14 the subpoenas -- in this case, it happens to be the
15 government -- to pursue that, first with me, and
16 then I go up the chain through our national office.

17 And then like Mr. McCown says, it is
18 rare for these to actually come to fruition, and I
19 have no reason to be dishonest with you: I have
20 not had one go that far.

21 And then my understanding is, once
22 there's a federal court action initiated to enforce
23 the subpoenas to testify within an OSHRC
24 proceeding, y'all continue to pursue that.

25 MR. LOPEZ-LOFTIS: That is correct, Your Honor.

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1 And it's not --

2 JUDGE DUNCAN: And then we would reconvene.

3 One possibility is reconvene for a continuation of
4 the trial. Another possibility is that I order
5 that a trial deposition be conducted, and then
6 you'd submit the portions of that trial deposition.
7 My inclination would definitely be to reconvene
8 once the District Court orders those two
9 individuals to appear.

10 It's one thing -- because I've had
11 this happen in practice and I understand -- it's
12 one thing to be surprised by the fact that someone
13 hasn't appeared when they've been subpoenaed
14 because there's no indication that they wouldn't
15 have appeared. You executed the proper service.

16 But what Mr. McCown is saying concerns
17 me because you tried to do this a year ago? Six
18 months ago? Something like that. Through an
19 administrative subpoena for an OSHA investigative
20 interview, and they didn't show up at that time.

21 Why was the federal action in District
22 Court not pursued to make them show up back when
23 the investigation was going on? That's my first
24 question. And the second question is: If you knew
25 there'd be a problem, why haven't you alerted me

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1 about this before now?

2 MR. LOPEZ-LOFTIS: Well, Your Honor, I cannot
3 speak exactly to what happened on the
4 administrative level. We have our OSHA rep here
5 that may be able to shed some light on that. I can
6 confer with him on that briefly and make
7 representations to the Court.

8 But as I outlined in my response to
9 the Respondent's motion, I got on this case --

10 JUDGE DUNCAN: Well, I'm not sure the motions
11 and the responses have anything to do with the
12 witnesses not showing up this morning, do they?

13 MR. LOPEZ-LOFTIS: No, they do not --

14 JUDGE DUNCAN: So the --

15 MR. LOPEZ-LOFTIS: -- but they have made some
16 objections to some of the witnesses, and that's why
17 I was tying that in.

18 JUDGE DUNCAN: Okay.

19 MR. LOPEZ-LOFTIS: But your point is noted,
20 Your Honor. But in terms of what I have done since
21 I've got on this case, again I represent to the
22 Court that I've made every effort to get these guys
23 subpoenaed.

24 And I also represent to the Court that
25 I was somewhat blindsided because the deposition

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1 transcripts that we received we actually -- they
2 were provided by their counsel. I conferred with
3 their counsel. And initially he was very
4 responsive, seemed like he was onboard. But when
5 it came to --

6 JUDGE DUNCAN: Same attorney represents both
7 men?

8 MR. LOPEZ-LOFTIS: The same attorney, yes.

9 JUDGE DUNCAN: Okay.

10 MR. LOPEZ-LOFTIS: And I guess this is -- this
11 is another point where the motion kind of ties in,
12 because that was addressed in their motion.

13 I did have some communication with
14 these -- this attorney for Brian Mullins in which
15 he was very cooperative and provided deposition
16 transcripts from their state court litigation,
17 which is how we were able to get these -- these
18 documents that we have proposed as exhibits.

19 And -- and again, the -- I was
20 somewhat blindsided by the fact that he would not
21 accept these subpoenas. And then at that point,
22 that's when we took the efforts to go ahead and get
23 a process server, which again, out of an abundance
24 of caution, I believe the rules only require
25 someone over the age of 18. But I took the efforts

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1 to actually get a -- a professional, licensed
2 process server to get both Brown and Mullins served
3 and get them here today.

4 Again, I had ample communications with
5 that attorney. It seemed like he was onboard. But
6 at some point, his cooperativeness kind of flipped
7 on me, and that's why we're here today.

8 JUDGE DUNCAN: Okay. All right. Well, like I
9 said or started to say 15 minutes ago, we're going
10 to table this issue. It doesn't look like Mr.
11 Mullins and Mr. Brown are going to be here.

12 You're going to make copies of the
13 proof of service information that you have, both
14 for Respondent and for myself.

15 And then, really, I think, you know,
16 before the end of the trial, it's really incumbent
17 upon you as to whether you want to make a motion to
18 enforce those subpoenas.

19 But for now, we're going to set those
20 two witnesses aside. We're going to go forward
21 with the other issues.

22 All right?

23 MR. LOPEZ-LOFTIS: Okay.

24 JUDGE DUNCAN: Thank you.

25 MR. LOPEZ-LOFTIS: Thank you, Your Honor.

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1 JUDGE DUNCAN: Anything else from Respondent
2 before we move on from that topic?

3 MR. McCRRORY: Nothing else, Your Honor.
4 Thank you.

5 JUDGE DUNCAN: Okay. Now let's get into the
6 motions, and let's see if the withdrawal of some of
7 these exhibits and the issue on the witnesses has
8 changed anything.

9 I still show that the government is
10 going forward with their exhibit list, which
11 contains now C-1 through C-5 intending to be
12 introduced, C-10 and C-11 and C-17 and C-18.

13 Do I have that correct, Mr. Lopez?

14 MR. LOPEZ-LOFTIS: That is correct, Your Honor.

15 JUDGE DUNCAN: Okay. With those exhibits
16 remaining as proposed, government exhibits, either
17 Mr. McCown or Mr. McCrory, do you still maintain
18 your objections to those exhibits in your motion?

19 MR. McCRRORY: Yes, Your Honor, we maintain our
20 objections to everything that wasn't produced to us
21 during discovery.

22 JUDGE DUNCAN: Okay. Give me a summary again
23 as to why you believe those exhibits should not be
24 allowed to even be offered to be introduced.

25 MR. McCRRORY: I think it would be most

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1 productive if I address each exhibit piece by
2 piece.

3 JUDGE DUNCAN: Okay.

4 MR. McCRRORY: So my understanding is, and
5 please correct me if I'm wrong, that C-1 through
6 C-5 are still being offered, but they were produced
7 during discovery, so we do not have that objection.
8 We reserve others if -- if -- for later. But they
9 were produced during discovery.

10 Six and seven have been withdrawn.

11 JUDGE DUNCAN: Well, let's -- let's -- let's do
12 what you proposed. Let's take them item by item.
13 You don't have an argument as to C-1 through C-5 in
14 terms of disclosure during discovery?

15 MR. McCRRORY: That's correct. That's out.

16 JUDGE DUNCAN: Timeliness is your objection?

17 MR. McCRRORY: That is correct. Yes, we --

18 JUDGE DUNCAN: Any other objections on C-1
19 through C-5?

20 MR. McCRRORY: No other -- at this point, no
21 other objections.

22 JUDGE DUNCAN: Okay. Sorry, I'm just trying to
23 keep this all together. Y'all made a lot of
24 arguments and responses, and I'm trying to narrow
25 this down and see what's still in dispute and see

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1 what's not, so I appreciate you working with me.

2 So C-1 through C-5, you're maintaining
3 the motion as to the timeliness of their production
4 and then part of their pretrial disclosure?

5 MR. McCRRORY: That is correct.

6 JUDGE DUNCAN: Okay. Thank you. And C-10?

7 MR. McCRRORY: Yeah. So C-6 and C-7 were
8 withdrawn. Our understanding is also C-8 and C-9
9 are withdrawn. C-10 was produced to us during
10 discovery. We would only have a timeliness
11 objection as it relates to when the exhibits were
12 served in relation to the pretrial statement.

13 JUDGE DUNCAN: Okay.

14 MR. McCRRORY: C-11 was not produced to
15 Respondent during discovery. Respondent also has
16 the timeliness objection.

17 And C-12 and C-13 -- just so -- they
18 were withdrawn by the Secretary, so I will move on
19 C-13 and C-14.

20 MR. McCOWN: Those were also withdrawn.

21 MR. McCRRORY: Were those also withdrawn?

22 MR. LOPEZ-LOFTIS: Yes, that's correct.

23 MR. McCRRORY: And 15 and 16 were withdrawn, and
24 so we have no further objection.

25 C-17, the business record affidavit,

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1 we still preserve our timeliness objection because
2 we did not receive that 10 days before trial.

3 JUDGE DUNCAN: Okay.

4 MR. McCRRORY: And then it's also Respondent's
5 understanding that C -- there's no objection to
6 C-18, and C-19 has been withdrawn.

7 JUDGE DUNCAN: No objection to C-18?

8 MR. McCRRORY: That's correct. It was -- it's
9 something that we produced and was also produced to
10 us during discovery.

11 JUDGE DUNCAN: Okay. And I want to clarify,
12 too, to make sure we're on the same page.

13 Normally, what I would do at the beginning of a
14 trial is I'd walk through, if we didn't have these
15 pending motion and responses, walk through each
16 exhibit and find out which exhibits we could
17 stipulate to their admissibility. Not in terms of
18 any weight or any reference, but just so that we
19 don't have to go through laying the foundation to
20 get them admitted.

21 And typically someone will indicate
22 there's no objection to C-18 being admitted, and I
23 would say C-18, then, is admitted, and leave it to
24 y'all to talk about it with the witnesses.

25 When you say no objection to C-18, do

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1 you mean you're not maintaining your motion to
2 strike it, basically, as a sanction or do you also
3 mean that you'll stipulate to its admissibility?

4 MR. McCRRORY: So you're correct. There's two
5 parts there. We still maintain our motion that we
6 received untimely. But as far as admissibility
7 goes, if it is going to come in, we have no
8 objections.

9 JUDGE DUNCAN: Okay. Well --

10 MR. McCRRORY: It's actually on our witness --
11 on our exhibit list, as well, so --

12 JUDGE DUNCAN: Okay. All right. Well, C-18,
13 you said no objection. So C-18, there's no dispute
14 with C-18?

15 MR. McCRRORY: That's correct.

16 JUDGE DUNCAN: Okay. Thank you.

17 MR. McCRRORY: There -- may I mention one thing?

18 JUDGE DUNCAN: Please.

19 MR. McCRRORY: And I -- I have not had a chance
20 to look at the Secretary's binder that was placed
21 on our table of exhibits, but when C-18 was
22 originally produced to us, it was over 800 pages,
23 so I don't know if it -- if it's been cut down or
24 what happened.

25 JUDGE DUNCAN: Mr. Lopez?

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1 MR. LOPEZ-LOFTIS: Yes, Your Honor. We --
2 we've culled the Exhibit 18 down there to just
3 specifically the safety manual. And I believe the
4 safety manual was, as Respondent represented, it
5 was the first 70 -- roughly 72 or 75 pages of this
6 800-page document. So we culled that down just to
7 those 70-something pages, which includes the safety
8 manual for Basic Energy.

9 MR. McCRRORY: Since there was that confusion,
10 it may be helpful if we go off of Respondent's
11 exhibit. Respondent Exhibit 1 is the same
12 document. It's the first 72 pages of the safety
13 manual. I have not had a chance -- I was never --
14 I never received this version of his own binder and
15 haven't had a chance to review to see if it's
16 different from what was provided as part of the
17 pretrial statement.

18 JUDGE DUNCAN: Well, you had it before today?

19 MR. McCRRORY: I did.

20 JUDGE DUNCAN: You had it -- well, actually,
21 let's get into it as the next thing. Timeliness is
22 the objection that you have that you're maintaining
23 from your motion with regard to, basically, C-1
24 through C-5, and then C-10, C-11 and C-17. That
25 runs through as a common theme pursued still in

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1 your motion for all of this.

2 So let's ask the question: When did
3 you receive those exhibits from the government?

4 MR. McCRRORY: I received them on March 1st.

5 JUDGE DUNCAN: All of those?

6 MR. McCRRORY: All of those. I did not receive
7 6 and 7. I found out later that they were not
8 going to be produced.

9 JUDGE DUNCAN: Yeah. Okay. So I'm kind of
10 focusing in now on the window of the ones that you
11 -- you -- that are still being offered.

12 So C-1 through C-5, C-10, C-11 and
13 C-17, Respondent received copies of those proposed
14 trial exhibits on March 1st?

15 MR. McCRRORY: Respondent did.

16 JUDGE DUNCAN: They were due on February 27th.

17 Mr. Lopez, why did they not receive
18 them until March 1st?

19 MR. LOPEZ-LOFTIS: Your Honor, as I outlined in
20 the motion and attached exhibits, too, what I at
21 least attempted to do was I attached all these
22 exhibits to a zip file, and emailed them to the
23 Respondent.

24 JUDGE DUNCAN: On?

25 MR. LOPEZ-LOFTIS: On the 27th at around 4 --

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1 [Pause to search for time sent.]

2 JUDGE DUNCAN: That's all right. I read that
3 in the -- in your response.

4 MR. LOPEZ-LOFTIS: Yes, and so --

5 JUDGE DUNCAN: I don't need the time.

6 MR. LOPEZ-LOFTIS: So it is Exhibit E to my
7 response. With the email confirmation with --
8 showing the trial exhibits attached as a zip file,
9 along with the prehearing statement. A courtesy
10 copy of it was emailed to the Respondent on the
11 27th, which was the deadline, at 4:45 p.m.

12 And then I -- I received at around 8
13 -- nearly 9 a.m. -- 9 p.m. that same evening a
14 rejection saying that it did not go through.

15 And I -- once I saw it -- I'm an early
16 riser, Your Honor, and so on the email that I sent
17 following up with the Respondent on this particular
18 issue was at 4:47 a.m. on that next morning, once I
19 actually saw the rejection in my email inbox.

20 So I promptly sent them an email to
21 let them know the issue. And I wanted to confirm
22 whether or not it actually went through or not, and
23 then I also indicated -- which I did because I was
24 going to drop them on a CD and overnight them to
25 the Respondent. And that's exactly what I did the

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1 following day.

2 And according to the confirmation that
3 I -- that I also attached as an exhibit, as they
4 represented, it was delivered on the 1st.

5 JUDGE DUNCAN: All right. Thank you.

6 What about with regard to Exhibit
7 C-11, the police report, as you've described it on
8 your exhibit list, not being produced in discovery?

9 MR. LOPEZ-LOFTIS: Yes, Your Honor. With that
10 exhibit -- and -- and again, this was -- the
11 discovery on that particular -- with this --
12 pertaining to this particular question was, I
13 guess, produced and responded to well before I got
14 on this case.

15 And from what I understand, this
16 document was withheld under the government
17 informant's privilege, which is what I assume,
18 under the understanding that these employees,
19 Mullins, Brown, were still employed with Basic
20 Energy.

21 And based off what was produced during
22 that discovery that I reviewed, I understood that
23 that document was initially withheld under that
24 privilege.

25 Again, Your Honor, I got on this case

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1 maybe about three or four weeks ago. And once I
2 reviewed the file and saw what was done or not
3 done, I attempted to go ahead and pursue the case
4 and work it up in preparation for the trial.

5 And so as I represented in my motion,
6 all efforts that I've taken since I've got on this
7 case have been made in good faith. They have not
8 been made in an attempt to prejudice the Respondent
9 or to create some type of unfair advantage.

10 These documents, I saw them, once I
11 started to review the file, and I turned these
12 documents over pursuant to Rule 26 as supplemental
13 responses when I was attempting to turn them over
14 --

15 JUDGE DUNCAN: So let me stop you there,
16 because the timeline on these things is -- is --
17 that facts of all this I'm trying to keep straight.

18 So the police report was originally by
19 another attorney withheld on the basis of
20 deliberative process privilege?

21 MR. LOPEZ-LOFTIS: Not deliberative process.
22 Government informant.

23 JUDGE DUNCAN: Government informants?

24 MR. LOPEZ-LOFTIS: So this -- we were talking
25 about the police --

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1 JUDGE DUNCAN: Let -- let me -- let me stop
2 this. I just want to ask a couple of questions.
3 Sorry to interrupt.

4 MR. LOPEZ-LOFTIS: Yes, Your Honor.

5 JUDGE DUNCAN: The government informant's
6 privilege was applied, and that's the only basis on
7 which it was withheld?

8 MR. LOPEZ-LOFTIS: That's my understanding,
9 Your Honor.

10 JUDGE DUNCAN: Is the police report something
11 that's available? I can go down to whatever police
12 department that is and ask for a copy of that
13 policy report?

14 MR. LOPEZ-LOFTIS: That is correct.

15 JUDGE DUNCAN: Okay.

16 MR. LOPEZ-LOFTIS: With the Woods County
17 Sheriff's Office.

18 JUDGE DUNCAN: And then you came into the case,
19 and I understand you said you just came in a month
20 ago, or I can't remember how long, about a month
21 ago, I think. The police report was then
22 disclosed? Or was the first time that you provided
23 it to the other side in the pretrial statement?

24 MR. LOPEZ-LOFTIS: The first time I provided it
25 was in the pretrial.

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1 JUDGE DUNCAN: Okay.

2 MR. LOPEZ-LOFTIS: And -- and another, I guess,
3 ancillary point or issue with that -- and from what
4 I understand from the Respondent's motion is that
5 they are objecting to the timeliness on the basis
6 that it prejudiced their case.

7 But in my review and preparation for
8 this trial, I actually noticed that in the
9 deposition transcripts of Johnny Mullins, which
10 they were present, Respondent was, and they are a
11 party to that litigation. This particular police
12 report they objected to was discussed at length in
13 that deposition.

14 And also from what I understand from
15 reading the deposition transcript, that the
16 Respondent actually provided that document to the
17 plaintiffs in that state court litigation.

18 And so -- and again, I preface that as
19 an ancillary issue, but I -- I -- I -- I represent
20 that to the Court just to note that just in my
21 review, if they're claiming that they're prejudiced
22 by not receiving this document from the Solicitor,
23 they had this document in their possession based on
24 what I reviewed from the deposition transcripts,
25 and I have specific cites to the -- that deposition

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1 transcript where they discussed this document, if
2 the Court would -- would like to see that, Your
3 Honor.

4 JUDGE DUNCAN: Well, the deposition transcripts
5 are part of what's been withdrawn as you planning
6 to offer into evidence, right?

7 MR. LOPEZ-LOFTIS: Well --

8 JUDGE DUNCAN: Well, just answer that question
9 first.

10 MR. LOPEZ-LOFTIS: Provisionally, Your Honor,
11 what I represented earlier was we were going to
12 provisionally withdraw those two deposition
13 transcripts on the basis of the two witnesses
14 showing up to testify.

15 JUDGE DUNCAN: Now --

16 MR. LOPEZ-LOFTIS: If they showed up -- and so
17 theoretically speaking, Your Honor, if they showed
18 up to testify today, we -- we did not intend to
19 introduce those two exhibits, the transcripts.

20 We were only intending to use those as
21 -- for impeachment purposes because we have not had
22 a chance to meet with these witnesses. We've only
23 reviewed the documents that have been contained in
24 the file and noted some of the statements that
25 they've made, which is why they were subpoenaed

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1 here today.

2 Now, if they do not show up to
3 testify, which it does not look like they are, then
4 we would at least attempt to offer them into
5 evidence under one of the exceptions to -- of the
6 hearsay rule --

7 JUDGE DUNCAN: Unavailability.

8 MR. LOPEZ-LOFTIS: -- and/or -- yes.

9 JUDGE DUNCAN: And I wouldn't grant that even
10 if you moved on it. We're going to deal with their
11 nonappearance here --

12 MR. LOPEZ-LOFTIS: Okay.

13 JUDGE DUNCAN: -- it sounds like -- if you move
14 for that, which you haven't yet -- the enforcement
15 of those subpoenas. So I'm going to set that aside
16 still for a minute.

17 MR. LOPEZ-LOFTIS: Yes, Your Honor.

18 JUDGE DUNCAN: But I appreciate the
19 explanation.

20 Mr. McCrory represented in the motion,
21 or maybe the reply, that they weren't parties to
22 that civil litigation; is that right?

23 [Overlapping speakers.]

24 JUDGE DUNCAN: Go ahead.

25 MR. McCRORY: So we are parties to the Harris

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1 County litigation. We are not parties to the case
2 that I cited.

3 JUDGE DUNCAN: Okay.

4 MR. McCRRORY: And which is a -- in Tarrant
5 County.

6 JUDGE DUNCAN: Okay.

7 MR. HURT: I think just for clarity purposes,
8 Your Honor, I think there's two pending state court
9 litigation cases, and so as Mr. McCrory said.

10 JUDGE DUNCAN: What are the two? What are the
11 difference between the two?

12 MR. McCRRORY: Well, I'm no expert in all of the
13 facts of what's going on.

14 JUDGE DUNCAN: Just -- just give me a summary
15 of it.

16 MR. McCRRORY: But one case is against the -- I
17 believe basically the manufacturer, and then the
18 other is a lawsuit against all the service
19 providers and that were present onsite at the
20 incident.

21 JUDGE DUNCAN: And the second one is the one
22 you are a party to?

23 MR. McCRRORY: That's correct.

24 JUDGE DUNCAN: And the first one you're not?

25 MR. McCRRORY: That's correct.

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1 JUDGE DUNCAN: Okay. So you're arguing that
2 they were aware the police report existed as the
3 result of a subpoena [sic] taken in the case that
4 they are a party to?

5 MR. LOPEZ-LOFTIS: Yes, Your Honor. And I'm
6 not sure if it was by subpoena, but I know, based
7 on our review of a deposition transcript, they were
8 produced by Basic in that case and they were
9 present during that particular deposition. And I
10 believe it's Johnny Mullins' deposition that I'm
11 referring to.

12 MR. McCOWN: Your Honor, may I speak to that?
13 I -- I -- it is very clear from our motion that it
14 really doesn't matter whether we were aware of the
15 police report or not. What matters is how we
16 prepared for this case and what we know the
17 Secretary is using as evidence against Respondent.

18 And in that, you know, we don't see
19 the police report until eight days before trial.
20 That's different than being aware of its existence.
21 We had to prepare for this case. We needed to know
22 what evidence the Secretary has against the
23 Respondent and be able to conduct discovery on
24 that.

25 As far as the Complainant's claim that

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1 it was withheld due to the government informer's
2 privilege, I question that because Mullins and
3 Brown are both disclosed in Complainant Exhibit 3.
4 It's not that their identities were trying to be
5 protected from Respondent's knowledge, and
6 specifically in reference to the police report.

7 JUDGE DUNCAN: Thank you.

8 MR. LOPEZ-LOFTIS: May I please respond, Your
9 Honor?

10 JUDGE DUNCAN: Last time, then I'm going to --
11 I think I know where I'm going, but I'll give you
12 one more time, Mr. Lopez.

13 MR. LOPEZ-LOFTIS: Yes, Your Honor. Just to
14 kind of briefly respond to what he said.

15 The way I understand the government
16 informant's privilege, and again I qualify this
17 statement that, you know, this action was taken
18 before I got on this case. But the way I
19 understood -- the way I understand the government
20 informant's privilege is that it's supposed to
21 protect the informant's identity as to any
22 statements that they've made against the interest
23 of the Respondent in this case, not necessarily
24 their identity as a whole.

25 And again, once I got on this case, I

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1 worked it up, and I learned in the process of these
2 past four weeks of me preparing for trial that
3 these witnesses were no longer employees of Basic,
4 which is why I went ahead and turned them over in
5 preparation for today's trial.

6 JUDGE DUNCAN: Okay. Thank you. All right.
7 Well, I appreciate all the explanation and all the
8 arguments by both sides on this issue.

9 Like I said, I read everything that
10 you filed, the motion, the supplemental motion, the
11 response and the reply to the motions. But I also
12 want to supplement that with some discussion here
13 this morning.

14 And I appreciate the fact that we have
15 cut through some of the issues by the government
16 going back over their exhibit list and simply
17 choosing to not offer certain exhibits. For
18 whatever reason, it has resolved some of the issues
19 in the motion.

20 So as I understand it now, we have C-1
21 through C-5, C-10, C-11, and C-17 being the
22 remaining exhibits in the government's proposed
23 exhibit list that they will offer in this trial.

24 MR. LOPEZ-LOFTIS: Your Honor --

25 JUDGE DUNCAN: Respondent -- go ahead.

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1 MR. LOPEZ-LOFTIS: I believe it's also 18, as
2 well.

3 JUDGE DUNCAN: Oh, C-18? I'm sorry. Thank
4 you. C-18 is the one that the Respondent doesn't
5 have an objection to. That's why it was left off
6 my list.

7 MR. LOPEZ-LOFTIS: Okay.

8 JUDGE DUNCAN: So you're right. Thank you.
9 But in talking about this motion and trying to
10 resolve this motion so we can move forward with the
11 trial, Respondent has a timeliness objection, as
12 we've talked about, to all of those exhibits that
13 are in dispute.

14 In addition, they've got another
15 objection pursuant in the motion on C-11, the
16 police report, as we've talked about for not being
17 produced in discovery.

18 Do you have any disagreement, Mr.
19 Lopez, that C-11, the police report, was responsive
20 to one of Respondent's discovery requests?

21 You don't dispute that, do you?

22 MR. LOPEZ-LOFTIS: To be quite candid, Your
23 Honor, I have not reviewed the responses in
24 sufficient detail to make a representation of
25 whether or not that is --

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1 JUDGE DUNCAN: All right. Well, let me tie up
2 that loose end.

3 Mr. McCrory, which discovery request
4 would the police report have been responsive to?

5 MR. McCRORY: It would have been responsive to
6 Request No. 6. Also No. 5.

7 JUDGE DUNCAN: Could you tell me what those ask
8 for?

9 MR. McCRORY: Oh, I'm sorry. No. 6 asks for
10 all affidavits, taped records, videotapes or
11 written statements taken from Respondent's
12 employees. Make a claim of informer's privilege as
13 may produce said statements with necessary
14 deletions to protect the identities of the
15 informers for Inspection No. 1084476.

16 And I made a -- I misspoke when I said
17 5. I just meant No. 6.

18 JUDGE DUNCAN: And how would the police report
19 have been responsive to your request for statements
20 from Respondent's employees?

21 MR. McCRORY: The police report and the -- it
22 contains statements from Respondent's employees,
23 but it also has C-12 and C-13 are statements from
24 one of Respondent's employees, Mr. Mullins.

25 JUDGE DUNCAN: Okay. Mr. Lopez?

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1 MR. LOPEZ-LOFTIS: I'm not sure I understood
2 the last comment that Respondent made with regards
3 to your question, Your Honor.

4 JUDGE DUNCAN: Well, I mean, you know, at some
5 point we're going to start this trial, so I'm
6 trying to cut through this.

7 The police report contained statements
8 from employees of Respondent at the time that's
9 related to this accident.

10 MR. LOPEZ-LOFTIS: That is correct, Your Honor.

11 JUDGE DUNCAN: So because the police report
12 contained statements that I assume the police took
13 from employees, then it would be responsive to, I
14 think he said, Request No. 6, which asks for any
15 statements taken from Respondent's employees.

16 The police report was publicly
17 available, so had the government informer's
18 privilege not been asserted, and it doesn't sound
19 like it was appropriately asserted, anybody could
20 have walked down to that county police station and
21 said I'd like a copy of that police report.

22 So those statements, at least, given
23 to police and included in that police report don't
24 seem to me, although I'm not really ruling on a
25 discovery issue, as if they would have been

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1 protected by that privilege.

2 So one argument is that you -- once
3 you got in on this case, could have made that
4 assessment and produced that and supplemented with
5 it.

6 How long have you been on the case,
7 I'm sorry?

8 MR. LOPEZ-LOFTIS: About --

9 JUDGE DUNCAN: Four weeks? Five weeks?

10 MR. LOPEZ-LOFTIS: Yes, about four weeks, Your
11 Honor.

12 JUDGE DUNCAN: Okay. At that time. It didn't
13 happen, and I'm not faulting you, because I
14 understand you step in and you learn things as you
15 learn them when you're new on a case.

16 But we're in trial. There's an issue.
17 There's a motion. You know, arguing the timing and
18 the lack of production of that, which didn't happen
19 until the pretrial statement was made, and even
20 that was late.

21 So because the police report is
22 relevant -- and I also agree with Mr. McCrory:
23 This litigation is not the Harris County litigation
24 or the other litigation related to the manufacturer
25 of the beam, I think you said. This litigation is

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1 | this litigation.

When someone requests discovery in
this litigation, they're entitled to the
information and the witnesses that you intend on
relying on or that provide information about the
case in this litigation.

7 You, likewise, you're entitled to that
8 information from the Respondent.

9 So in terms of C-11, on the basis that
10 it wasn't disclosed in discovery, on the basis that
11 I don't think that a government informer probably
12 was correctly asserted to begin with, on the basis
13 that it wasn't supplemented once you came into the
14 case, on the basis that it wasn't produced until
15 March 1st, which was two days late.

16 Anyway, although that's really not my
17 primary motivation, but for all the reasons
18 discussed here, C-11 is going to be stricken and
19 the motion is going to be granted as to Exhibit
20 C-11.

21 [Complainant's Exhibit No. C-11 was
22 stricken.]

23 JUDGE DUNCAN: With regard to the timeliness
24 objection on C-1 through -5, C-10 and C-17, you
25 know, I note the facts in the motion and the fact

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1 that y'all have gone over today, and Mr. Lopez
2 didn't make a good faith attempt to electronically
3 provide you with a copy of all of those exhibits on
4 February 27th, which is the day that they were due.

5 I also note that this is a case in
6 which the parties have agreed to electronically
7 file and serve one another, you know, using that
8 method.

9 I also note Mr. Lopez, and there
10 doesn't seem to be any dispute, that when he
11 discovered that early the next morning, he made an
12 immediate attempt to try to correct that problem.
13 You know, I would recommend if you try to do
14 something a little more expeditious next time,
15 especially since I believe both lawyers are here in
16 Dallas.

17 A personal walk over to the office to
18 give them that, once you realized your chosen
19 method of serving the pretrial statement failed,
20 might have been a better choice than to scan it
21 onto a disk, FedEx it overnight for somebody, when
22 really it's just a few blocks away, which caused
23 another day in delay.

24 But you did get the exhibits on March
25 1st, two days late. I acknowledge that, and I

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1 think Mr. Lopez acknowledges that.

2 But I'm taking his efforts in those
3 two days to try to get them to you into account. I
4 don't think you're prejudiced by getting those on
5 March 2nd [sic].

6 I think most of the exhibits you've
7 objected to in your motion have been withdrawn.
8 These are the ones that we have left.

9 Anyway, your timeliness objections as
10 to Exhibit C-1 through C-5, C-10, C-11 and C-17 in
11 your motion are going to be denied. So to that
12 extent, the motion is not granted.

13 Does everybody understand the ruling?
14 C-11, the motion is granted. C-11 will not be
15 introduced into evidence.

16 C-1 through -5, C-10 and C-17, the
17 motion is denied.

18 Everybody on the same page?

19 MR. LOPEZ-LOFTIS: Yes, Your Honor. I
20 understand the Court's ruling on that, but just
21 some clarification questions.

22 If a witness testifies to maybe some
23 observations observed based off their review of
24 their police report, can they go into that?

25 JUDGE DUNCAN: Well, I'm going to leave that to

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1 Mr. McCrory and Mr. McCown as to whether they
2 object, and we'll deal with it at that time.

3 MR. LOPEZ-LOFTIS: Okay.

4 JUDGE DUNCAN: All right. Before we keep
5 going, and I know we're delaying this thing. We've
6 had a lot of issues to get through.

7 Are there any other issues or
8 questions about my rulings that you want to make
9 before we move forward from Respondent?

10 MR. McCOWN: May I -- may I address one, Judge?

11 JUDGE DUNCAN: Please.

12 MR. McCOWN: C-17 is a business record that
13 relates to C-11, C-12 and C-13. Is that
14 superfluous now, given your rulings?

15 JUDGE DUNCAN: Well, it relates to -- well,
16 that's a good point. C-11 is stricken. C-12 and
17 -13 are withdrawn.

18 Mr. Lopez, do you agree with that?

19 The business record --

20 MR. LOPEZ-LOFTIS: I do, Your Honor. I agree
21 with that.

22 JUDGE DUNCAN: Okay. And these are all going
23 to remain -- well, we actually need to address
24 that. Because you withdrew certain exhibits and
25 told me at the beginning of the trial you do not

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1 plan to offer them into evidence, I would have them
2 taken out of the exhibit notebooks. They would not
3 be part of this record because they were never
4 offered, they were never objected to, they were
5 never rejected.

6 So C-11, which we've talked about now,
7 that will remain in the record as a rejected
8 exhibit as a sanction by granting the motion. All
9 right? I'm just trying to make sure everybody's on
10 the same page.

11 But all of the other exhibits that as
12 you went through you said are withdrawn, are not
13 marked, are not part of the record, would not be
14 there for appeal. I want to make sure you
15 understand that.

16 MR. LOPEZ-LOFTIS: I understand, Your Honor.

17 JUDGE DUNCAN: Okay. So C-12 and -13, which
18 Mr. McCown just asked about, for the purposes of
19 this trial don't exist.

20 All right? Do you understand?

21 MR. LOPEZ-LOFTIS: I understand.

22 JUDGE DUNCAN: Okay. So Mr. McCown's question
23 is a good one. C-11 is not going to be admitted.

24 Do we need C-17 anymore, because all
25 of the exhibits that that relates to are not in

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1 this record.

2 Do you understand my question?

3 MR. LOPEZ-LOFTIS: I understand, Your Honor,
4 and I agree with that. I have no objection.

5 JUDGE DUNCAN: So is C-17 going to be
6 withdrawn?

7 MR. LOPEZ-LOFTIS: Yes. We'll -- we'll -- we
8 will withdraw it, Your Honor, given the Court's
9 ruling.

10 JUDGE DUNCAN: All right.

11 MR. LOPEZ-LOFTIS: But --

12 JUDGE DUNCAN: I'll keep C-11 in the record
13 just for the purposes of any appeal that might
14 happen after this case is over because we've spent
15 so much time talking about it. But my
16 understanding from you is C-17 is withdrawn,
17 correct?

18 MR. LOPEZ-LOFTIS: Okay. Given what the Court
19 just indicated, could it -- is it possible that 17
20 would also be kept in the record just for appeal
21 purposes, because it is attached to C-11, which you
22 indicated will be included in just for appeal
23 purposes.

24 JUDGE DUNCAN: Any objection to that?

25 MR. McCOWN: No, sir.

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1 JUDGE DUNCAN: All right. So C-17, yes, it
2 will be. C-17 is also remaining in the record
3 marked as an exhibit.

4 [Complainant's Exhibit No. C-17 was
5 rejected.]

6 MR. LOPEZ-LOFTIS: And again -- and also, Your
7 Honor, just to clarify for 8 and 9, I represented
8 we'd provisionally withdraw it, but, you know,
9 given the circumstance with the witnesses that we
10 tabled, I guess we're -- we're not necessarily
11 wanting to withdraw them until we, I guess, hash
12 out the issue of the witnesses.

13 JUDGE DUNCAN: Yeah, but I think I addressed
14 that a minute ago. You intended to if they didn't
15 show to try to make some argument that I would let
16 the depositions in --

17 MR. LOPEZ-LOFTIS: Right.

18 JUDGE DUNCAN: -- because of unavailability or
19 something to that effect, right?

20 MR. LOPEZ-LOFTIS: That's correct.

21 JUDGE DUNCAN: Which I wouldn't do. If you
22 want to leave them in as marked exhibits for part
23 of the record for appeal purposes -- is that what
24 you're asking?

25 MR. LOPEZ-LOFTIS: Yes, Your Honor.

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1 JUDGE DUNCAN: Mr. McCrory and Mr. McCown, do
2 you have objection to that?

3 MR. McCOWN: No, we have no objection.

4 JUDGE DUNCAN: All right.

5 MR. McCOWN: One other thing, too. I know this
6 is really getting --

7 JUDGE DUNCAN: Hold on. Let me put this on the
8 record. So C-8 and C9 will remain in the record as
9 marked exhibits. Go ahead.

10 [Complainant's Exhibit Nos. C-8 and
11 C-9 were rejected.]

12 MR. McCOWN: So they will be like a withdrawn
13 exhibit but remain in the record? I'm --

14 JUDGE DUNCAN: It will be -- it will be a
15 marked exhibit.

16 MR. McCOWN: Okay. But not admitted?

17 MR. HURT: And that is -- [overlapping
18 speakers].

19 MR. McCOWN: And the same with 17, would be a
20 marked exhibit but not admitted except as related
21 to stricken Exhibit 11.

22 JUDGE DUNCAN: Nothing is admitted yet.

23 MR. McCOWN: Okay.

24 JUDGE DUNCAN: We've simply been dealing all
25 morning with the motion to strike and sanction.

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1 We're about to go through the exhibits that we have
2 left and find out whether we can preliminarily
3 agree to admit them or whether -- and later, if
4 not, we'll move to admit them through the
5 witnesses.

6 MR. McCOWN: Yeah, I was just a little confused
7 as to where 17 was running around.

8 JUDGE DUNCAN: I understand, you know, and
9 before we go further, I think we need to walk back
10 through this list and we'll talk about each one so
11 everybody's on the same page.

12 This is a recordkeeping nightmare
13 here, but we'll get through it.

14 All right. You know, and as we go
15 through these, we'll go -- what would normally be
16 my next step, I want to find out the ones that are
17 still in, basically, the pretrial statement.

18 As I said to Mr. McCown, nothing's
19 admitted yet. We simply dealt with what's still
20 here and what's not to be offered to be admitted.

21 But as I go through this list and
22 explain as I understand it, you correct me if -- if
23 somehow I get something wrong, but also let me know
24 whether, just for the purposes of admissibility,
25 you can agree that a certain exhibit can be

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1 admitted into the record.

2 It still needs to be discussed with
3 the witnesses, but let's go through that, and I'll
4 start with -- let's just start with Respondent's
5 exhibits. We haven't talked about those.

6 Mr. Lopez, do you have any objections
7 to the admissibility of Respondent's Exhibit R-1?

8 MR. LOPEZ-LOFTIS: No, Your Honor.

9 JUDGE DUNCAN: All right. And we need to talk
10 a little bit about that as to how it relates to the
11 one that Mr. McCrory said is duplicative or
12 somewhat duplicative of yours.

13 And, really, the best way to do that
14 is on a break, I think you all, when we go off the
15 record, need to compare R-1 to R -- or C....

16 MR. LOPEZ-LOFTIS: Oh, C -- C-18.

17 JUDGE DUNCAN: C-18? And see if you can come
18 together on an agreement as to which one to use,
19 because I certainly don't need 72 pages of the
20 safety book manual twice in the record.

21 But for now, you have no objection to
22 R-1. R-1 is admitted.

23 [Respondent's Exhibit No. R-1 was
24 admitted as evidence.]

25 JUDGE DUNCAN: What about R-2?

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1 MR. LOPEZ-LOFTIS: No objection, Your Honor.

2 JUDGE DUNCAN: R-2 is admitted into the record.

3 [Respondent's Exhibit No. R-2 was
4 admitted as evidence.]

5 JUDGE DUNCAN: Any objection to R-3?

6 MR. LOPEZ-LOFTIS: No objection.

7 JUDGE DUNCAN: R-3 is admitted into the record.

8 [Respondent's Exhibit No. R-3 was
9 admitted as evidence.]

10 JUDGE DUNCAN: Any objection to R-4?

11 MR. LOPEZ-LOFTIS: No objection.

12 JUDGE DUNCAN: R-4 is admitted into the record.

13 [Respondent's Exhibit No. R-4 was
14 admitted as evidence.]

15 JUDGE DUNCAN: Any objection to R-5?

16 MR. LOPEZ-LOFTIS: No objection, Your Honor.

17 JUDGE DUNCAN: R-5 is admitted into the record.

18 [Respondent's Exhibit No. R-5 was
19 admitted as evidence.]

20 JUDGE DUNCAN: Now, when I say "admitted," you
21 understand I mean admitted into evidence.

22 R-6?

23 MR. LOPEZ-LOFTIS: No objection.

24 JUDGE DUNCAN: R-6 is admitted into the record.

25 [Respondent's Exhibit No. R-6 was

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admitted as evidence.]

2 JUDGE DUNCAN: R-7?

3 MR. LOPEZ-LOFTIS: And no objection.

JUDGE DUNCAN: All right. So all off

5 Respondent's exhibits without objection are
6 admitted into the record.

[Respondent's Exhibit No. R-7 was admitted as evidence.]

9 JUDGE DUNCAN: Now let's walk through
10 Complainant's exhibits.

15 MR. McCRORY: You have not dealt with this
16 issue of witnesses.

17 JUDGE DUNCAN: Okay. Any other issues that I
18 haven't dealt with?

19 MR. McCROBY: No.

20 JUDGE DUNCAN: Okay. For the purposes of
21 continuing on the exhibit discussion, Exhibit C-1
22 I've already ruled on in terms of the motion.

25 MR. McCRRORY: No, Your Honor.

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1 JUDGE DUNCAN: All right. C-1 is admitted into
2 the record.

3 [Complainant's Exhibit No. C-1 was
4 admitted as evidence.]

5 JUDGE DUNCAN: Any objection to C-2?

6 MR. McCRRORY: No, Your Honor.

7 JUDGE DUNCAN: All right. C-2 is admitted into
8 the record.

9 [Complainant's Exhibit No. C-2 was
10 admitted as evidence.]

11 JUDGE DUNCAN: C-3?

12 MR. McCRRORY: No, Your Honor.

13 JUDGE DUNCAN: C-3 is admitted.

14 [Complainant's Exhibit No. C-3 was
15 admitted as evidence.]

16 JUDGE DUNCAN: C-4?

17 MR. McCRRORY: No objection.

18 JUDGE DUNCAN: C-4 is admitted.

19 [Complainant's Exhibit No. C-4 was
20 admitted as evidence.]

21 JUDGE DUNCAN: C-5?

22 MR. McCRRORY: No objection.

23 JUDGE DUNCAN: C-5 is admitted.

24 [Complainant's Exhibit No. C-5 was
25 admitted as evidence.]

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1 JUDGE DUNCAN: C-10?

2 MR. McCRRORY: We object to that exhibit.

3 JUDGE DUNCAN: What's the basis?

4 MR. McCOWN: May I address that, Your Honor?

5 JUDGE DUNCAN: Please.

6 MR. McCOWN: May I stand?

7 MR. LOPEZ-LOFTIS: Before -- I'm sorry to
8 interrupt, but 6 was one of the exhibits that was
9 withdrawn.

10 JUDGE DUNCAN: We're talking about C-10. I
11 went from C-5 to C-10.

12 MR. LOPEZ-LOFTIS: Oh, okay. Okay, gotcha.
13 Sorry about that.

14 JUDGE DUNCAN: Mr. McCown?

15 MR. McCOWN: The API standards are not adopted
16 by OSHA; they're guidelines, they're
17 recommendations. There's been a lot of litigation
18 over API standards where OSHA will take an API
19 standard and use it as far as like "should" and
20 turn it into a "shall," which there's a long line
21 of cases that -- that have rejected that approach,
22 and I think there's like 150-some-odd standards,
23 not just API, that had to be reduced and deleted.

24 So we -- we object to the API
25 standards on the basis that it is not an adopted

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1 regulation by OSHA, especially when you have a
2 general duty clause citation.

3 JUDGE DUNCAN: Okay. What I'm going to do is,
4 like I said, we're going through and determining
5 which ones we can stipulate to. I'm going to note
6 that objection. I'm going to ask you if the
7 Secretary offers C-10 into evidence to the witness
8 to renew it, and then at that time I'll give the
9 government a chance to respond to the objection.

10 MR. McCOWN: All right.

11 JUDGE DUNCAN: Thank you. C-11?

12 MR. McCRRORY: No objection.

13 JUDGE DUNCAN: Oh, I'm sorry. C-11 is
14 stricken.

15 MR. McCRRORY: That's correct.

16 JUDGE DUNCAN: Unless you want to change your
17 position and no objection, Mr. McCrory.

18 MR. McCRRORY: No, we're not changing our
19 position.

20 JUDGE DUNCAN: All right. C-11 I've already
21 dealt with in the motion. C-17 has been withdrawn.
22 I show that's all -- well, we have C-18, as well,
23 which you all are going to talk about and figure
24 out whether we can use R-1 or C-18, correct?

25 MR. McCRRORY: That is correct.

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1 MR. LOPEZ-LOFTIS: That is correct, Your Honor.

2 JUDGE DUNCAN: So I'm going to hold off on
3 C-18. It's not admitted yet. I've admitted R-1,
4 talk to the other side on the first break we have
5 and figure out whether we can continue to use R-1,
6 and if not, you need to revisit C-18 with me and
7 let me know whether for some reason we need to use
8 that one instead.

9 Is everybody on the same page?

10 MR. McCRRORY: Understood.

11 JUDGE DUNCAN: All right. And that's all the
12 Complainant's exhibits that I show at this point.

13 Do you agree, Mr. Lopez?

14 MR. LOPEZ-LOFTIS: Yes, Your Honor.

15 JUDGE DUNCAN: Mr. McCrory?

16 MR. McCRRORY: I agree, Your Honor.

17 JUDGE DUNCAN: Okay. And as you just pointed
18 out, Mr. McCrory, there's an outstanding issue with
19 regard to the witness list, correct?

20 MR. McCRRORY: That is correct, Your Honor.

21 JUDGE DUNCAN: What is the current motion
22 status with regard to Complainant's witness list?
23 What's your -- who are you objecting to and why?

24 MR. McCRRORY: There were four individuals not
25 identified during the discovery period. My

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1 understanding is that David Cummings and Keith
2 Dale, who are with the Sheriff's Office, are not
3 going to be testifying, so I do not need to address
4 that situation.

5 But James Nelson, who is an engineer
6 with OSHA, he was not identified during discovery.
7 He does not appear in the documents that were
8 produced to Respondent. And also, George Ogle,
9 which correct me if I'm wrong, you -- it's my
10 understanding he will not be called as a witness.
11 Mr. Lopez?

12 MR. LOPEZ-LOFTIS: Yeah, we weren't able to get
13 him served, so he will not be called as a witness.

14 MR. McCRRORY: But we still object to him being
15 ever able to testify in these proceedings, but it
16 may be a moot point.

17 JUDGE DUNCAN: Okay. So the objection that
18 still remains from the motion is James Nelson's
19 lack of disclosure in discovery and sudden
20 appearance on the pretrial witness list?

21 MR. McCRRORY: That's correct. And our argument
22 is two-fold.

23 One, I don't think he should be able
24 to testify today because we didn't know about him
25 until after discovery period closed. And also, we

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1 weren't able to, if we wanted to, take his
2 deposition or defend our case because we didn't
3 know that he was a potential witness until after
4 discovery period closed.

5 The same goes for George Ogle. I said
6 earlier that, you know, if he's not going to appear
7 here, then our objection to him testifying really
8 doesn't matter.

9 That's the same idea, that his -- he
10 was not identified during discovery period, and we
11 weren't able to pursue channels of defense or
12 prepare our case with the knowledge of -- of what
13 the Secretary intended to bring on the last day,
14 and that's why we have a motion to dismiss.

15 We think that there are lots of issues
16 here. I understand Your Honor has already ruled on
17 the timeliness issue, but I think everything, taken
18 as a whole, this last-minute disclosure of
19 witnesses has prejudiced Respondent.

20 We don't think they should testify,
21 but we also want to pursue our motion to dismiss
22 because this case has been pending for quite some
23 time. This citation was entered -- issued back in
24 January 2016.

25 It's been set for trial once already.

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1 It was not moved until October 28th, when it was
2 just a little over a month before trial, and we did
3 not under -- we never heard about Mr. Nelson being
4 a potential witness in this until just in these
5 last few weeks, and the same goes for Mr. Ogle.

6 JUDGE DUNCAN: Thank you. Mr. Lopez, a
7 response?

8 MR. LOPEZ-LOFTIS: As far as Mr. Ogle, he will
9 not be -- he's withdrawn, so he will not be called
10 up to testify.

11 With regards to James Nelson, unlike
12 your --

13 JUDGE DUNCAN: Let me stop you there, because I
14 think Mr. McCrory and Mr. McCown are alerted to the
15 fact, and they should be, and you should be, too,
16 that if in fact because of Mr. Mullins and
17 Mr. Brown I have to delay a second half of this
18 trial for the subpoena enforcement, it is possible
19 that you could then go out and subpoena Mr. Ogle or
20 try to subpoena Mr. Ogle.

21 So Mr. McCrory has put into the record
22 his continuing objection to Mr. Ogle, should that
23 happen. So -- and I don't know if it'll happen or
24 not.

25 But because of that, why don't you

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1 also still address Mr. Ogle just for the record.

2 MR. LOPEZ-LOFTIS: I understand. Well, with
3 regards to both witnesses, Your Honor, as soon as
4 they became apparent to the Secretary in this case,
5 they were supplemented, unlike the ruling on the
6 other exhibits. They were supplemented to the
7 Respondent on February 13th. I believe the
8 discovery deadline was a little less than a week
9 prior to that.

10 But I'll represent to the Court that
11 James Nelson was not necessarily apparent in the
12 file when we -- the Secretary got the case. And
13 when we learned that Mr. Nelson was a part of this
14 case as a witness, a potential witness, we
15 supplemented our responses, again, on February
16 13th.

17 He -- I personally contacted, in
18 preparation for trial, OSHA, and then that's when
19 OSHA indicated or alluded to Mr. Nelson, and then
20 that's when I did some further digging into his
21 role in this case.

22 And what I learned is, he was actually
23 called down from Salt Lake City to assist in this
24 investigation. He went out to the site, he
25 conducted some calculations, and he advised OSHA on

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1 this citation that was ultimately cited.

2 And when I learned of his identity,
3 for purposes of this case, I immediately
4 supplemented my responses to the Respondent on
5 February 13th.

6 JUDGE DUNCAN: So Mr. Nelson was involved as
7 part of the investigative team from the beginning?

8 MR. LOPEZ-LOFTIS: That is correct. He was
9 called down by OSHA to assist, to provide technical
10 support to the OSHA team that was working on this
11 case. He traveled from Utah to Oklahoma, went out
12 to the scene of the accident while the scene was
13 still preserved in its condition, collapsed
14 condition, and conducted the -- a lot of the review
15 of this case.

16 And he ultimately advised OSHA on the
17 citation that was issued, which he's here today.
18 He's prepared to testify to that.

19 JUDGE DUNCAN: And do you agree with Mr.
20 McCrory that his name is nowhere in the documents
21 that were produced to Respondent?

22 MR. LOPEZ-LOFTIS: They were not initially
23 because we were not aware of his identity. And I
24 understand it to be the case with prior counsel,
25 and know it was definitely the case once I got on

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1 this case. And once I learned that he -- of his
2 identity, I immediately supplemented the responses
3 to the Respondent in good faith and what I believe
4 to be in compliance with Rule 26, disclosures,
5 which allows for supplementing a witness if --
6 after the discovery deadline if another fact or
7 witness becomes apparent.

8 JUDGE DUNCAN: Did the previous counsel that
9 was handling this case know about Mr. Nelson's
10 involvement?

11 MR. LOPEZ-LOFTIS: I'll represent to the Court
12 that he did not whatsoever. And this is based on
13 my conversations with him and my review of the
14 file. He was not identified in this file.

15 And once I -- and how I learned of his
16 identity was actually through my preparation and
17 speaking with OSHA. And his name just came up in
18 conversation. I did some further digging, and
19 learned his role in this case, and I immediately
20 supplemented my responses.

21 JUDGE DUNCAN: But the folks within OSHA, not
22 the Solicitor's Office, that were involved in the
23 investigation of this case knew from the beginning
24 of the investigation of Mr. Nelson's involvement?

25 MR. LOPEZ-LOFTIS: That is correct, based on my

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1 dealing and what I learned from them. They did
2 know of his identity.

3 JUDGE DUNCAN: My concern is -- and I don't
4 know what your practice is or what the counsel's
5 practice before you on this case was, but when you
6 get discovery requests from the other side and they
7 ask questions, I assume, that say list fact
8 witnesses who have immediate knowledge of this
9 case, or something to that effect, that you take
10 those discovery requests and you give them to the
11 client, I would hope that all parties do that, to
12 say, work with me, attorney, in developing the
13 answers to these questions: Who are the people
14 that were involved in this investigation? Who are
15 the fact witnesses that may have knowledge of
16 relevant facts related to this case? What are
17 documents that are relevant to this case?

18 If Mr. Nelson was heavily involved, as
19 it sounds like he was, from the beginning of this
20 investigation, part of the investigative team, went
21 out to the site, took measurements, drew diagrams
22 -- I can't remember exactly what all you said --
23 from the beginning of this case, which is, I don't
24 know, 18 months old, I forget the date, the exact
25 date, it seems to me that there might not have been

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1 that communication in the discovery responses
2 because it seems to me, just as a former practicing
3 attorney, that his name would have immediately
4 popped up when OSHA is consulted about those
5 discovery requests.

6 Do you agree or disagree with that?

7 MR. LOPEZ-LOFTIS: I agree with that, Your
8 Honor.

9 JUDGE DUNCAN: Okay.

10 MR. LOPEZ-LOFTIS: And then again, I'll preface
11 it, my statement, my comments, that I cannot speak
12 to what the previous attorney did when he was on
13 this case.

14 JUDGE DUNCAN: Understood.

15 MR. LOPEZ-LOFTIS: My practice is as such as
16 what you've indicated. And again, all the actions
17 that I personally took in this case since I got on
18 it were made in good faith.

19 This witness was a surprise to me.
20 When I learned of his identity and I immediately
21 supplemented my responses on the 13th, which I
22 believe were about four or five days, roughly
23 speaking, after the discovery deadline, which I had
24 got on the case two weeks prior to that.

25 So all -- and then also, Your Honor, I

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1 also indicate, as I did in my earlier comments,
2 that Basic was present during this -- these
3 inspections. And from what I understand, they
4 interacted with Nelson.

5 And so I will represent to the Court
6 that this was more of a surprise to the Solicitor's
7 Office than it was to Basic. Now, I understand
8 their objection on this case, but again, my actions
9 taken in this case were all made in good faith. I
10 immediately supplemented the responses, which were
11 on the 13th, which is about three or four weeks
12 before this trial.

13 And also, Your Honor, when I got on
14 the case, two weeks before the discovery deadline,
15 I conferred with counsel to agree to an extension
16 on the discovery deadline. And I also asked for
17 some depositions, which they -- they fell through.

18 And they declined my request to agree
19 to an extension on the discovery, which left me to
20 do exactly what I did, is basically scramble to try
21 to prepare this case for trial. I'm not using that
22 as an excuse, but just stating that for the record.

23 But again, everything that -- all the
24 actions that I've taken have been in good faith.

25 JUDGE DUNCAN: Mr. McCrory or McCown, do you

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1 want to respond?

2 MR. McCOWN: May I respond? For the record,
3 we're not -- we understand Mr. Lopez's situation,
4 and I think he definately tried to do what he could
5 do to remedy this problem.

6 This particular individual is an
7 engineer employed by OSHA, and my assumption,
8 because he doesn't show up in this entire
9 inspection file, not once, is that they weren't
10 going to use him as a witness, which would be, I
11 think, a normal response. They have an engineer
12 who maybe went to a worksite, and he said , you
13 know, Basic didn't have anything to do with this.
14 And that would be my conclusion.

15 Now all of a sudden, he shows up as a
16 witness to testify on something very technical
17 under an API standard. It has some very discreet,
18 technical terms to it. And I don't know what he's
19 going to say.

20 And I am not going to go forward with
21 this hearing. I'm going to ask for a continuance
22 if he's going to be allowed to testify. And I
23 don't think he should be allowed to testify.

24 And I think it's not -- I'm not going
25 to say it's Mr. Lopez's fault. I know how the

March 9, 2017

1 government works, when they have to change lawyers
2 and, you know, they get overrun. Our contest rate,
3 I just found out yesterday, it's up to ten and a
4 half percent, so -- from seven, so good luck over
5 the next couple of years.

6 So they have files that have to be
7 shuffled around. People leave, and they have a lot
8 more caseload than they have budget to handle it.

9 But the fact of the matter is is I
10 anticipate that this guy's going to have very
11 significant testimony, and I do not even know how
12 to cross-examine him, except for just do the old
13 McCown throw it up against the wall and see how it
14 works. That's not fair to Respondent.

15 So I think there's three avenues:
16 dismissal, which would be the ultimate sanction;
17 continuance, which I don't think anybody wants; or
18 exclusion of him as a witness.

19 MR. LOPEZ-LOFTIS: May I --

20 JUDGE DUNCAN: Thank you.

21 MR. LOPEZ-LOFTIS: -- respond?

22 JUDGE DUNCAN: Go ahead. But let me ask you a
23 question, Mr. Lopez. Just give me a summary of
24 what his testimony is going to be about, if he's
25 allowed to testify.

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1 MR. LOPEZ-LOFTIS: If he's allowed to testify,
2 Your Honor, Mr. Nelson is going to testify to his
3 observations that he made when he came out and
4 inspected the site, including taking measurements
5 of the collapsed equipment, his review of the
6 statements that were contained in the police
7 reports, other interview statements that were made,
8 his -- his conferring with OSHA on the matter, and
9 ultimately how he advised OSHA on the citation that
10 was ultimately issued in this case.

11 So he's very essential to the case.
12 He had a substantial amount of involvement in the
13 case. And again, we supplemented those responses
14 to those requests as soon as this individual became
15 apparent to the Solicitor's Office in preparation
16 for this case, which was on February 13th.

17 JUDGE DUNCAN: And I appreciate that, but you
18 understand Respondent's position: that was a week
19 after discovery closed.

20 MR. LOPEZ-LOFTIS: That is correct, Your Honor,
21 but again, like I said, in good faith I contacted
22 the Respondents, verbally and by email, about
23 trying to request an extension of the discovery
24 deadline prior to the discovery deadline, because
25 when I got on this case, I initially intended to

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1 take some depositions, which I requested from the
2 Respondents. That ultimately fell through. And so
3 I was left with we basically came up with a hearing
4 today.

5 JUDGE DUNCAN: Okay. Thank you. I'll tell you
6 right now, I'm not going to dismiss the citation.
7 That sanction will not be happening.

8 So the motion, to the extent that it's
9 requesting that the case be dismissed, is denied on
10 all bases: on the timeliness, on the lack of
11 production of the exhibits, on the disclosure of
12 Mr. Nelson.

13 I think you're all aware there's a
14 strong presumption in the case law of deciding
15 these cases on their merits after full opportunity
16 by both sides in conventional cases to explore the
17 facts and discovery, to address all the issues they
18 need to address, and put on all of their evidence.

19 I am concerned about Mr. Nelson,
20 because as you just said in your reply, he was
21 substantially involved in this investigation from
22 the beginning, and yet he was not disclosed to them
23 until discovery had ended, which was just, you
24 know, really your date, I think, was about three
25 weeks ago.

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1 MR. LOPEZ-LOFTIS: Right.

2 JUDGE DUNCAN: And then he was listed on the
3 pretrial.

4 MR. LOPEZ-LOFTIS: But, Your Honor, he was not
5 -- he was supplemented in the responses.

6 JUDGE DUNCAN: On February 13th.

7 MR. LOPEZ-LOFTIS: Right. Which was prior
8 to --

9 JUDGE DUNCAN: Three and a half weeks ago.

10 MR. LOPEZ-LOFTIS: Right, right, Your Honor,
11 and again, I did that with what I thought was in
12 compliance with the Federal Rules of Civil
13 Procedure, Rule 26, which actually calls for
14 situations such as this when a witness becomes
15 apparent at a later date after some discovery
16 responses have already went out. It provides that
17 a party is able to supplement responses.

18 And I'll also represent to the Court,
19 Your Honor, I tried to do depositions. If they
20 wanted to depose him after I disclosed him, even
21 after the discovery deadline, I would have been all
22 for that. But that -- that was not the case. And
23 I did what I thought would be prudent, given the
24 circumstance.

25 JUDGE DUNCAN: I understand. You did the right

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1 thing, based on what I've heard and everything that
2 you've said and represented to me. And I think Mr.
3 McCown just acknowledged that as somebody coming
4 late into the game is exactly what I would think
5 anybody, you know, who's aware of what they're
6 doing in these cases should do.

7 But again, this sanction is against
8 the party. It's against OSHA. It's the Secretary
9 of Labor, it's not against you personally, Mr.
10 Lopez. So I appreciate the fact that you're
11 explaining that you came in and you identified
12 these issues. You tried to supplement. You tried
13 to extend the discovery period to allow them to
14 take a late deposition of Mr. Nelson.

15 And it might have been too late. Too
16 little too late simply because that was, like I
17 said, three -- three and a half weeks from today,
18 very recently.

19 MR. McCOWN: May I put one other thing in the
20 record?

21 JUDGE DUNCAN: Okay. Go ahead.

22 MR. McCOWN: After hearing Mr. Lopez's
23 explanation of what Mr. Nelson will testify to, he
24 almost sounds like, based upon the fact that I
25 think he's been represented as an engineer, is an

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1 expert. And if he's going to render any kind of an
2 opinion, then I definitely -- I don't like to take
3 depositions in OSHA cases, but when you have an
4 expert designated, I do like to take their
5 deposition.

6 MR. LOPEZ-LOFTIS: He has not been designated
7 as an expert, and we do not intend him to testify
8 as an expert. We only intended for him to testify
9 to this personal observations and his involvement
10 in the inspection in this case.

11 JUDGE DUNCAN: Yeah, okay. I appreciate both
12 those comments. I mean, I noted that he had him
13 listed as a professional engineer but not as a
14 potential expert witness, so he certainly can call
15 him as a -- as a fact witness. It sounds like he
16 was involved with the investigation anyway.

17 You know, let me tell you all where my
18 thinking is right now, and then I want to hear from
19 both parties on it.

20 This case has a lot of complexities, a
21 lot of pretrial procedural complexities. I don't
22 spend, and you probably don't spend, to the extent
23 you've tried these cases before, the first two, two
24 and a half hours sitting here walking through, you
25 know, these procedural motions, sanction requests,

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1 motions to dismiss, discovery issues. You know, I
2 always tell everybody, to the extent that you've
3 come up on the morning of trial, discovery issues
4 need to be identified, motions filed within the
5 pretrial time frame and dealt with before we get
6 here.

7 Now, I know anybody who's litigated
8 three cases or more some issues still come up
9 beyond their control, and sometimes we have to talk
10 about these things.

11 Let me ask you, Mr. Lopez, how
12 important are Mr. Mullins and Mr. Brown's testimony
13 to your prosecution of this case?

14 MR. LOPEZ-LOFTIS: They're very important, Your
15 Honor, because they were two of the essential key
16 witnesses.

17 And Mullins was actually one of the
18 victims that was injured in this accident. Excuse
19 me, Brown was injured in this accident.

20 Mullins was the rig operator on the
21 rig, operating it when it collapsed, and Mullins
22 [sic] was the tool pusher sitting right next to
23 Mullins. Brown was standing -- he was standing
24 right next to Mullins at the time of the accident
25 and was injured.

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1 And both of those employees are --
2 both of those witnesses worked for Basic at the
3 time of the accident.

4 JUDGE DUNCAN: Here's what I'm thinking. And I
5 know I've made some partial rulings. Several of
6 the issues that you've brought to my attention,
7 from Respondent's motion, from the issue on the
8 subpoenas for Mr. Mullins and Mr. Brown not being
9 here, can be cured by time. Can be cured.

10 You know, you mentioned moving for a
11 continuance. I'm not sure you're going to have to
12 do that, because I'm leaning towards delaying this
13 trial, and I want to talk about it with you guys,
14 with the parties, the representatives, to do
15 several things in the interim.

16 Is it your intention to move for
17 enforcement of those subpoenas?

18 MR. LOPEZ-LOFTIS: That's correct, Your Honor.

19 JUDGE DUNCAN: All right. If we delay the
20 continuation of this trial to enforce -- for an
21 enforcement proceeding on the subpoenas for Mr.
22 Mullins and Mr. Brown, and during the interim I
23 allow limited discovery on Mr. Nelson by the
24 Respondent through whatever avenue they choose --
25 and like Mr. McCown said, it's up to them as to

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1 whether they want to take a deposition -- but I'll
2 also probably allow some written discovery to get
3 information on his background, his involvement,
4 things like that.

5 I will leave it up to you as to what
6 you do with Mr. Ogle. I addressed that a minute
7 ago. But that his -- your decision to not call
8 him, you said, was because you couldn't get him
9 subpoenaed. I'll leave that up to you to decide in
10 the interim whether or not you want to pursue that.

11 Things can all be cured by moving --
12 and this is our second trial date, so this trial
13 had already been continued once.

14 No one filed a motion to continue it
15 from this date.

16 I know there's all these issues which
17 you raised in your motion, Mr. McCrory.

18 But an extension of time for
19 conducting this trial can cure prejudices or at
20 least arguable prejudices to Respondent. It can
21 cure prejudices to Complainant in not having two
22 witnesses that you've described as being crucial to
23 your case present to testify.

24 You know, I do not like the idea of,
25 and would be very skeptical of, substituting

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1 deposition transcripts of some third-party's civil
2 litigation in lieu of their live testimony. They
3 are still alive. They still exist. You can find
4 them. We can get them here to testify. That's
5 always preferable.

6 I do not like how Mr. Nelson was
7 withheld from the Respondent, and did not appear
8 until three and a half weeks ago. So they were
9 deprived, as Mr. McCown says, of fundamental
10 information about this case and this investigation.

11 So what I'm leaning towards right now
12 is basically recessing this trial. And I know
13 that's inconvenient for me. It's inconvenient for
14 you. It's inconvenient for the witnesses.

15 Because there are lot of complicated
16 issues going on here. And I have no idea how long
17 a subpoena enforcement proceeding filed in District
18 Court to secure the presence of those two witnesses
19 would take. It may be adjourned for a while. I
20 think it'd be plenty of time to cure the issue on
21 Mr. Nelson in terms of your -- and it really would
22 cure these other issues, too, that we've talked
23 about in terms of timeliness of pretrial statement
24 disclosure.

25 But after hearing two hours' worth of

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1 this, I'm asking myself the question as to whether
2 that's not the best approach, and I'm going to
3 start with Respondent.

4 What's your position?

5 MR. McCOWN: We would object. We're here,
6 we're ready. It's not Respondent's fault that they
7 had to change counsel for whatever reason. We
8 haven't had any explanation for that.

9 There's really no explanation that's
10 any good about Nelson. That result, I think, will
11 do nothing but benefit the bad approach to this
12 case. And I'm not saying it's bad -- bad faith or
13 anything. It happened. Nelson wasn't disclosed.

14 They didn't do anything about the
15 subpoenas. I mean, I will supplement this record
16 with the -- the attempt and this enforcement action
17 that was filed by OSHA that they dropped when --
18 when the six months went away.

19 So their whole approach to this case
20 has been to hide things, Mr. Lopez. And you've got
21 an inspection file that was created by this
22 Compliance Officer that he doesn't even mention his
23 name.

24 And then we have a situation where
25 they can't get these guys to come in. That's not

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1 the first time. And they just let it sit there.

2 So we're being basically told that,
3 well, let's just make -- give us some more time so
4 we can cure those things. I don't think that's the
5 way it's supposed to work.

6 And so we would object to continue.

7 We're here and ready to go today. And we don't
8 think Mr. Nelson should be allowed to testify.

9 JUDGE DUNCAN: Mr. Lopez?

10 MR. LOPEZ-LOFTIS: Your Honor, the Secretary
11 concurs with the Court's recommendations you just
12 made, and we're willing to cure any defects that
13 exist in this case.

14 We're more than willing to produce Mr.
15 Nelson to be deposed if the Respondents so choose
16 or any other discovery requests that they wish to
17 propound. We're more than willing to comply with
18 that.

19 And I'm on this case now, so whatever
20 defects have been in existence at this point, we're
21 willing to do what it takes to cure it if given an
22 opportunity.

23 JUDGE DUNCAN: We're going to take a recess.
24 I'm going to think about this, and we'll come back
25 in 15 minutes. Let's be back in here at -- what is

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1 it, 10:45 now? Be back in her at 11 a.m.

2 [Recess from 10:43 a.m. until 11:09
3 a.m.]

4 JUDGE DUNCAN: All right. We're back on the
5 record after about a 20-minute recess. And I also
6 had an opportunity to talk to counsel in chambers
7 for a minute.

8 Mr. McCown, I'm going to let you speak
9 first. Is there an update, based on your
10 conversation with Mr. Hurt?

11 MR. MCCOWN: Yes, there is. And based upon our
12 conversations, I have decided to withdraw our
13 objection to the proposed sequence of events as far
14 as to the deferral or the adjourning of the case.

15 JUDGE DUNCAN: All right. Well, thank you.
16 Yeah, I've given this a lot of thought back there,
17 and I appreciate your conversation with counsel in
18 chambers.

19 And I think the best approach for this
20 case is to do what I said I was leaning towards
21 doing before -- before we recessed.

22 And I appreciate that Respondent is
23 withdrawing their objection, because I really think
24 that what will -- we have prejudices to both sides
25 right now, in my opinion, that can be cured.

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1 We have prejudices to the government
2 in that they, as far as I can tell, properly and
3 timely served two very important trial witnesses to
4 come and testify in this case. And if I were to go
5 forward with this trial today and hold them to
6 putting on the evidence that they have right now,
7 they would not be able to put on evidence that was
8 properly attempted to be secured.

9 You can never tell with certainty
10 unless they flat out tell you when you serve a
11 subpoena that someone's not going to come. I am
12 concerned with, like Mr. McCown said, that there
13 was this indication, you know, a year ago on an
14 administrative subpoena that they'd be
15 uncooperative.

16 But with that said, you serve somebody
17 with a federal subpoena to appear in court, you
18 presume they're going to show up, unless they flat
19 out say, "I'm not going to be there," which you
20 didn't have any indication of.

21 So it would be prejudicial to go
22 forward with this trial today with two, as you
23 said, very important witnesses not being here to
24 testify.

25 It would be prejudicial to the

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1 Respondent to go forward with this trial today,
2 considering the way Mr. Nelson was injected into
3 this case, from their perspective, at a very late
4 stage of the game, three and a half weeks before
5 trial and listed on the witness list.

6 So we are going to recess this trial.
7 This part of the record will remain part of the
8 record. And here's basically the conditions that
9 we're going to be following:

10 I'm going to give the government 15
11 days to file, if they choose to do so, a subpoena
12 enforcement action with regard to the two
13 witnesses, Mr. Mullins and Mr. Brown, who did not
14 appear.

15 I'm going to reset this trial for
16 sometime in July. I've got to get back and look at
17 my calendar, and I may float some dates to the
18 parties, but we're going to give this thing at
19 least, you know, ninety, a hundred days out to
20 account for a subpoena enforcement action being
21 initiated and hopefully resolved.

22 My rulings on the pretrial witness
23 list that we've gone through today will remain
24 intact.

25 This is not a regrouping that in a

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1 hundred days you submit a new pretrial statement
2 and you get to start from scratch.

3 I am concerned with the things that
4 Mr. McCown talked about before he withdrew his
5 objection.

6 This is not a restart. This is not a
7 all of a sudden you pick new trial exhibits and
8 witnesses on the Respondent's side, and all of a
9 sudden you pick new trial exhibits and witnesses on
10 the Complainant's side.

11 You know, the omissions in the
12 discovery, the lack of timeliness on some of the
13 pretrial things is not going to be forgiven by this
14 delay. All we're doing is trying to cure two
15 things: the prejudice to Respondent with Mr.
16 Nelson's existence and participation in this case,
17 and the prejudice to you with the two key witnesses
18 not showing up. Everything else, if we come back
19 to trial, remains the same, and we keep going
20 forward.

21 Okay? Does anybody have any questions
22 or clarification on that?

23 MR. McCOWN: Is there any -- you have a 15-day
24 time frame for the follow-up subpoena for
25 enforcement proceeding.

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1 JUDGE DUNCAN: Right.

2 MR. McCOWN: What about for the discovery on
3 Mr. Nelson?

4 JUDGE DUNCAN: Yeah. Well, you tell me,
5 because the prejudice is with you. I'm thinking if
6 we set this thing in July, depending on calendars,
7 I would think giving you 60 days would be plenty of
8 time to get that done.

9 MR. McCOWN: That's fine. That's fine, Your
10 Honor.

11 JUDGE DUNCAN: All right. Mr. Lopez, do you
12 agree?

13 MR. LOPEZ-LOFTIS: I agree. But one
14 clarification question. With the limited
15 discovery, is that only with respect to Mr. Nelson,
16 or does the Secretary have an opportunity to do
17 some discovery?

18 JUDGE DUNCAN: It does not. That goes with
19 what I was saying before. This is not a restart of
20 this case. We're simply trying to fix the problems
21 that we can't fix today. We can't fix the Nelson
22 problem from Respondent's perspective. We -- we --
23 and I'm not going to allow you to fix the
24 timeliness and the police report disclosure
25 problem.

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1 We are trying to fix the Nelson
2 prejudice and your prejudice as to the two
3 witnesses that didn't show up pursuant to subpoena
4 as if they did get to depose Mr. Nelson and those
5 two witnesses did show up and as if we would
6 continue to forward right now with this trial.

7 Okay? So there is no additional
8 discovery for the Complainant, and there's only
9 limited discovery to cure the Nelson problem for
10 the Respondent, and they've got 60 days to complete
11 it.

12 Any other issues, any other things
13 that you believe I need to address that I haven't
14 with that ruling, or any questions or
15 clarifications?

16 From the Complainant?

17 MR. LOPEZ-LOFTIS: No, Your Honor.

18 JUDGE DUNCAN: From Respondent?

19 MR. McCOWN: Nothing from Respondent.

20 JUDGE DUNCAN: Okay. And I apologize if we're
21 having to delay this and regroup. This thing is
22 procedurally challenging, and I think both of you
23 would be prejudiced if we went forward today in
24 putting on the evidence that we have.

25 You simply don't have, on the

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1 Complainant's side, the evidence that you are
2 entitled to, you know, having served the subpoenas.

3 And you don't have the evidence and
4 information that you're entitled to on the
5 Respondent's side.

6 So the best thing that I can think to
7 do is to recess this thing, reset it, cure these
8 defects, and reconvene.

9 And in the meantime, I always
10 encourage you to try to revisit the possibility of
11 settling this case. It would save you a lot of
12 time and resources.

13 So any questions before we close the
14 record for today?

15 MR. McCOWN: Nothing from Respondent.

16 MR. LOPEZ-LOFTIS: Nothing from the Secretary,
17 Your Honor.

18 JUDGE DUNCAN: All right. Thank you all.
19 We're in recess.

20 [Whereupon, these proceedings were
21 recessed at 11:18 a.m. on March 9,
22 2017, to reconvene at a future date.]

23

24

25

March 9, 2017

C E R T I F I C A T E

I, Ann Thornton Berry, hereby certify that this is the transcript of the proceedings held before the OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION, on March 9, 2017, in the matter of SECRETARY OF LABOR, Complainant, v. BASIC ENERGY SERVICES, L.P., Respondent, OSHRC Docket No. 16-0367, and that this is a full and correct transcript of the proceedings.

/s/ *Ann Thornton Berry*

ANN THORNTON BERRY, CSR

Official Reporter

1533 VZ County Road 4810

Chandler, Texas 75758

903-852-2232

Attachment 3



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
U.S. Customs House
721 19th Street, Room 407
Denver, CO 80202-2517

Phone: (303) 844-2282

Fax: (303) 844-3759

SECRETARY OF LABOR,

Complainant,

v.

OSHRC Docket No. 16-0367

BASIC ENERGY SERVICES LP,

Respondent.

ORDER COMPELLING WITNESS TESTIMONY AT TRIAL

**Michael Brown
456 CR 245
Beckville, TX 75631**

Pursuant to 29 U.S.C. §§661(i) and 161, and 29 C.F.R. §2200.57, you are hereby ORDERED to appear and testify at the trial in this case at 9:00 a.m. on March 1, 2018, at the following location:

**William M. Steger Federal Building and United States Courthouse
211 West Ferguson Street
Courtroom 102
Tyler, Texas 75702**

SO ORDERED.

Dated: February 6, 2018
Denver, CO


**Judge Brian A. Duncan
U.S. Occupational Safety and Health Review Commission**

CERTIFICATE OF SERVICE

CASE NAME: Basic Energy Services LP
OSHRC DOCKET NO.: 16-0367

Service of the foregoing *ORDER* has been made by mailing a copy thereof, via electronic mail
dated: February 6, 2018

Christopher D'Allen Lopez-Loftis
U.S. Department of Labor
Office of the Solicitor
525 S. Griffin Street, Suite 501
Dallas, Texas 75202
lopez.christopher.d@dol.gov;
docket.dallas@dol.gov

Sean M McCrory;
Steven Randolph McCown
Littler Mendelson, P.C.
2001 Ross Avenue, Suite 1500, Lock Box 116
Dallas, Texas 75201
smccrory@littler.com;
smccown@littler.com

/s/ *Eliz R Padilla*

Eliz R. Padilla
Legal Assistant
Judge Brian A. Duncan
U.S. Customs House
721 19th Street, Room 407
Denver, CO. 80202-2517
(303) 844-2282 FAX (303) 844-3759



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U.S. Customs House
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Phone: (303) 844-2282

Fax: (303) 844-3759

SECRETARY OF LABOR,

Complainant,

v.

OSHRC Docket No. 16-0367

BASIC ENERGY SERVICES LP,

Respondent.

ORDER COMPELLING WITNESS TESTIMONY AT TRIAL

**Johnny Mullins
12881 North Main Street
Overton, TX 75684**

Pursuant to 29 U.S.C. §§661(i) and 161, and 29 C.F.R. §2200.57, you are hereby ORDERED to appear and testify at the trial in this case at **9:00 a.m. on March 1, 2018**, at the following location:

**William M. Steger Federal Building and United States Courthouse
211 West Ferguson Street
Courtroom 102
Tyler, Texas 75702**

SO ORDERED.

Dated: February 6, 2018
Denver, CO

**Judge Brian A. Duncan
U.S. Occupational Safety and Health Review Commission**

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CASE NAME: Basic Energy Services LP
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525 S. Griffin Street, Suite 501
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/s/ *Eliz R Padilla*

Eliz R. Padilla
Legal Assistant
Judge Brian A. Duncan
U.S. Customs House
721 19th Street, Room 407
Denver, CO. 80202-2517
(303) 844-2282 FAX (303) 844-3759

Attachment 4

SUBPOENA TO APPEAR AND TESTIFY

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

TO Michael Brown, 456 CR 245, Beckville, TX 75631

Request therefor having been duly made by Christopher D. Lopez-Loftis, Trial Attorney

of 525 S. Griffin St., Ste. 501 Dallas Texas
(Street) (City) (State)

YOU ARE HEREBY REQUIRED AND DIRECTED TO APPEAR before Honorable Judge Brian A. Duncan

of the Occupational Safety and Health Review Commission, at Courtroom 102

William M. Steger Federal Building and United States Courthouse

211 West Ferguson Street

in the City of Tyler, Texas 75702

on the 1st *day of* March , 20 18 , *at* 9:00 *o'clock* a.m.

of that day, to testify in the Matter of Secretary of Labor v. Basic Energy Services, LP

OSHRC Docket No. 16-0367

And you are hereby required to bring with you and produce at said time and place the following books, records, correspondence, and documents:



In testimony whereof, the seal of the Occupational Safety and Health Review Commission is affixed hereto, and the undersigned has hereunto set hand and authorized the issuance hereof.

Issued at Denver, Colorado

This 7 *day of* February , 20 18

Brian A. Duncan, Judge, OSHRC U. S. Customs House
721 19th Street, Room 407
Denver, CO 80202-2517

NOTICE TO WITNESS. - Witness fees for attendance, subsistence, and mileage, under this subpoena are payable by the party at whose request the witness is subpoenaed. This subpoena should be retained and submitted with the voucher if reimbursement for witness fees from the U.S. Government is claimed.

RETURN OF SERVICE

I hereby certify that being a person over 18 years of age, I duly served a copy of the within subpoena

- In person

by certified mail-return receipt requested

by leaving a copy at principal office or place of business, or at the person's residence with some person of suitable age and discretion residing therein, to wit:

on the person named herein on 02/12/2018 7:15 pm

02/12/2018 7:15 pm

02/13/2018

(Month, Day, and Year)

LAREN TRITCH Laren Tritch
(Name of person making donation)

(Name of person making service)

PSC10955 EXP 5/31/20

(Official Title, if any)

I certify that the person named herein was in attendance as a witness at

On

(Month, Day, and Year)

(Name of person certifying)

(Official Title)

SUBPOENA TO APPEAR AND TESTIFY

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

To Johnny Mullins, 12881 North Main Street, Overton, TX 75684

Request therefor having been duly made by Christopher D. Lopez-Loftis, Trial Attorney

of 525 S. Griffin St., Ste. 501 Dallas Texas
(Street) (City) (State)

YOU ARE HEREBY REQUIRED AND DIRECTED TO APPEAR before Honorable Judge Brian A. Duncan

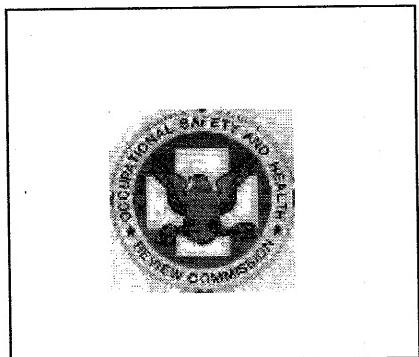
of the Occupational Safety and Health Review Commission, at Courtroom 102
William M. Steger Federal Building and United States Courthouse
211 West Ferguson Street

in the City of Tyler, Texas 75702

on the 1st *day of* March, 20 18, *at* 9:00 *o'clock* a.m.

of that day, to testify in the Matter of Secretary of Labor v. Basic Energy Services, LP
OSHRC Docket No. 16-0367

And you are hereby required to bring with you and produce at said time and place the following books, records, correspondence, and documents:



In testimony whereof, the seal of the Occupational Safety and Health Review Commission is affixed hereto, and the undersigned has hereunto set hand and authorized the issuance hereof.

Issued at Denver, Colorado

This 7 *day of* February, 20 18

A handwritten signature in black ink, appearing to read "B. A. Duncan".

Brian A. Duncan, Judge, OSHRC

U. S. Customs House
721 19th Street, Room 407
Denver, CO 80202-2517

NOTICE TO WITNESS. - Witness fees for attendance, subsistence, and mileage, under this subpoena are payable by the party at whose request the witness is subpoenaed. This subpoena should be retained and submitted with the voucher if reimbursement for witness fees from the U.S. Government is claimed.

RETURN OF SERVICE

I hereby certify that being a person over 18 years of age, I duly served a copy of the within subpoena

- in person
- by certified mail-return receipt requested
- by leaving a copy at principal office or place of business, or at the person's residence with some person of suitable age and discretion residing therein, to wit:

on the person named herein on

02/14/2018 4:20PM

02/21/2018

(Month, Day, and Year)

JANICE FRITCH LAREN FRITCH

(Name of person making service)

PSC10955 EXP 5/31/20

(Official Title, if any)

I certify that the person named herein was in attendance as a witness at

On

(Month, Day, and Year)

(Name of person certifying)

(Official Title)

Attachment 5



UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20TH STREET, NW, 9TH FLOOR
WASHINGTON, DC 20036-3457

General Counsel

Phone: (202) 606 - 5410
Fax: (202) 606 - 5417

April 4, 2017

Director Joseph H. Hunt
Civil Division, Federal Programs Branch
United States Department of Justice
20 Massachusetts Ave. NW
Washington, DC 20735

Dear Mr. Hunt,

I am writing to request your assistance in enforcing a subpoena issued by an Administrative Law Judge of the Occupational Safety and Health Review Commission (Commission). The Commission is an independent, quasi-judicial administrative agency established under section 12 of the Occupational Safety and Health (OSH) Act, 29 U.S.C. § 661.

Commission Rule of Procedure 57(a), 29 C.F.R. § 2200.57(a), promulgated under the authority granted the Commission in section 661(i) (making 29 U.S.C. § 161 applicable to the Commission), states that a Commission judge shall, “on the application of any party, issue to the applying party subpoenas requiring the attendance and testimony of witnesses and the production of any evidence” In the case of *Secretary of Labor v. Basic Energy Services, LP*, OSHRC Docket No. 16-0367, Judge Brian A. Duncan, at the request of the Secretary of Labor, who represents the Occupational Safety and Health Administration (OSHA), issued subpoenas on February 28, 2017, directing two individuals—Johnny Mullins and Michael Brown—to appear before the judge on March 9, 2017 at 9:00 a.m. for an administrative hearing at the Earle Cabell Federal Building in Dallas, Texas.¹ (Ex. C to Mot.)

Before retaining a certified process server, the Secretary first asked an attorney from the law firm Lapeze & Johns, PLLC, Keith Lapeze, whether he would accept service on behalf of Mr. Mullins and Mr. Brown. It appears that the Secretary believes both individuals are represented by this law firm in related state court actions involving Basic Energy Services and

¹ Following the collapse of an oil and gas service rig—which caused a serious injury and a fatality—OSHA conducted an investigation and then issued a citation to Basic Energy Services alleging a violation of section 5(a)(1) of the OSH Act, 29 U.S.C. § 654(a)(1). The company contested the citation, resulting in the adjudicatory proceeding before the Commission. See 29 U.S.C. § 659(c) (establishing procedure for employer to contest citation). The allegations in the citation concern Basic Energy Services’ alleged failure to remove employees working on the rig from its derrick before applying unusual loading on the rig. (Complaint at 11.) According to OSHA, Mr. Mullins and Mr. Brown were working on the rig when it collapsed and they are the only Basic Energy Services employees who survived the collapse.

one of its affiliates. Mr. Lapeze refused. (Ex. G to Mot.; Tr. 28-29, 31-32, 38-39.) Subsequently, via a certified process server, Mr. Mullins was served in person on February 28, 2017, and Mr. Brown was served in person on March 2, 2017. Both individuals failed to appear for the March 9, 2017 hearing. (Ex. C to Mot.)

The Secretary has now filed with the judge a Motion to Enforce Commission Trial Subpoenas.² The Secretary's position is that he is entitled to solicit Mr. Mullins' and Mr. Brown's testimony concerning (1) the events surrounding the accident, and (2) Basic Energy Services's "safety procedures and allocation of authority."³ The Secretary points out that the "central fact issues in this matter center on the conduct" of these two individuals "during the events leading to the accident." (Mot. at 4.) Basic Energy Services's Answer, which raises "unforeseeable employee misconduct" as an affirmative defense, lends credence to the Secretary's position. (Answer ¶ VIII.)

Because the Commission lacks the authority to petition the United States District Court to enforce the subpoena, I request that your office do so on the Commission's behalf in accordance with Commission Rule 57(e), 29 U.S.C. § 2200.57(e).⁴

² This is not the first time Mr. Mullins and Mr. Brown have refused to comply with subpoenas. Before issuing Basic Energy Services the citation at issue, OSHA—as part of its pre-citation investigation—issued subpoenas to both individuals in October 2015 to compel them to appear before OSHA personnel for interviews. (Ex. E to Mot.) According to the Secretary's motion, Mr. Mullins and Mr. Brown only agreed to be interviewed after a subpoena enforcement action was commenced in the relevant federal district court (Ex. F to Mot.), but at that point, OSHA had already issued the citation to Basic Energy Services. OSHA, therefore, did not interview them. (Mot. at 3 n.6.) Both individuals, however, appeared for depositions in the aforementioned state court actions. (Exs. A, H1, H2 to Mot.)

³ In its motion, the Secretary renews its request, previously raised at the March 9, 2017 hearing, that if the subpoenas are not enforced and the two individuals persist in their failure to comply, counsel be permitted to offer Mr. Mullins' and Mr. Brown's deposition testimony from the state court actions under Federal Rule of Evidence 804. (Mot. at 5-6.) At the hearing, the judge found that the depositions could not be admitted under Rule 804. (Tr. 53, 96-97, 101-02.)

⁴ Commission Rule 57(e) states as follows:

(e) *Failure to comply with subpoena.* Upon the failure of any person to comply with a subpoena issued upon the request of a party, the Commission by its counsel shall initiate proceedings in the appropriate district court for the enforcement thereof, if in its judgment the enforcement of such subpoena would be consistent with law and with policies of the Act. Neither the Commission nor its counsel shall be deemed thereby to have assumed responsibility for the effective prosecution of the same before the court.

Thank you in advance for your assistance with this matter. If you have any questions or need further information, please feel free to contact Ron Bailey (rbailey@oshrc.gov) or Pat Moran (pmoran@oshrc.gov), the attorneys in my office to whom this matter has been assigned, at 202-606-5410.

Sincerely,



Nadine N. Mancini
General Counsel

Attachments⁵

cc: Brian A. Duncan, Administrative Law Judge
Pat Moran, Senior Attorney Advisor
Ron Bailey, Attorney Advisor

⁵ Included with this letter is a CD that contains the entire case file for Docket No. 16-0367 and a docket sheet (compiled on April 4, 2017).